(18,687.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1903.

No. 141.

BANKERS MUTUAL CASUALTY COMPANY, PLAINTIFF IN ERROR,

vs.

THE MINNEAPOLIS, ST. PAUL AND SAULT SAINTE MARIE RAILWAY COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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Pleas and proceedings in the United States circuit court of appeals for the eighth circuit, at the May term, 1902, of said court, begun and held at the United States court house in the city of St. Paul, Minnesota, on the first Monday in May, to-wit: the fifth day of May, A. D. 1902, before the Honorable Walter H. Sanborn and the Honorable Amos M. Thayer, circuit judges, and the Honorable John E. Carland, district judge.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

Attest: JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it remembered that heretofore, to-wit: on the sixth day of March, A. D. 1902, a transcript of record, pursuant to a writ of error directed to the circuit court of the United States for the district of Minnesota, was filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit, in a certain cause wherein The Bankers Mutual Casualty Company was plaintiff in error, and The Minneapolis, St. Paul and Sault Sainte Marie Railway Company was defendant in error, which said transcript of record is in the words and figures following, to-wit:

1 United States Circuit Court, District of Minnesota,
Fourth Division.

Bankers Mutual Casualty Company, Substituted Plaintiff,
vs.
Minneapolis, St. Paul and Sault Sainte Marie Railway Company, Defendant.

Assignment of Errors.

Comes now the Substituted Plaintiff, The Bankers Mutual Casualty Company of Des Moines, Iowa, and alleges that in the above entitled cause the order of the Court sustaining the demurrer of defendant to the amended and substituted complaint filed by this plaintiff, and also the final judgment in said cause dismissing the complaint and for costs against this plaintiff, are erroneous, and against the rights of this plaintiff, and that there is manifest error therein upon the face of the record for the following reasons:

First. The Court erred in holding and ruling that the Amended and Substituted Complaint filed by the substituted plaintiff, the Bankers Mutual Casualty Company, does not state a cause of action against defendant, and erred in sustaining defendant's demurrer to plaintiff's petition upon each and any of the several grounds contained in said demurrer, and erred in rendering final judgment for defendant in said cause.

Second. The negligence of the defendant being admitted by the demurrer, the Court erred in holding that defendant owed no duty to The German State Bank, as the owner of a registered package contained in the United States mail, but owed such duty, if at all, only to the government of the United States, and erred in holding that defendant was not liable to plaintiff for the loss of such registered package caused or occasioned by defendant's said negligence.

Third. That negligence of the defendant being admitted by the demurrer, the Court erred in denying and in refusing to hold in favor of plaintiff, any of the following propo-
2 sitions: (1) That defendant owed said The German State Bank, as one of the public, using the mails for a legal purpose, the duty to carry said money package safely, such duty being imposed by a law of Congress for the benefit of The German State Bank and others of the public using the mails; or, (2) That defendant, as a common carrier in respect to said package, owed said German State Bank and

others using the mail, the duty to exercise due care in handling their property; or (3) that defendant was, at least, a bailee for hire in respect to said registered package the compensation being paid by the United States for the benefit of said The German State Bank and others lawfully transmitting packages by mail.

Fourth. The Court erred in holding that defendant, as a carrier of the United States Mails, under the United States statutes and the regulations of, and notification from the United States Post-office department, was not liable to the owner of a registered package contained in a mail-sack, in course of transmission through the United States mails, for the loss of such registered package, when such loss was caused or occasioned by or through the negligence of said defendant, while the mail-sack containing such registered package was in the care and custody of defendant for safe keeping and transmission thereof to the Post-office, at the point of destination.

Fifth. The Court erred in refusing to hold that defendant was under a statutory obligation to persons using the United States mails to safely care for the United States mail-sacks, received by defendant or its employee, from defendant's train at its depot at Harvey, and the registered package in question, therein contained, after said mail-sack was so received and during the night, and on the following morning to safely carry and deliver the same to the Post master or Post-Mistress at said town of Harvey, and erred in refusing to hold that the negligence of defendant, in failing to safely care for said mail-sack and the registered package therein contained, whereby said registered package was wholly lost, rendered defendant liable to The German State Bank as the owner of the said registered package for the amount of the loss caused by defendant's said negligence.

3 Sixth. The Court erred in holding that defendant, as a carrier of the United States mails, under the United States statutes and the regulations of and notification from the Post Office Department, was not liable to the owner of a registered package, contained in a mail-sack in course of transmission through the United States mails, for the loss of such registered package, when such loss was caused or occasioned by or throught the negligence of one of defendant's employees, charged by defendant with the care or custody of the mail-sack containing said registered package, while said mail-sack was in the care or custody of defendant's said employee for safe keeping and transmission to the Post Office at the point of destination.

Seventh. The Court erred in refusing to hold that defendant, as a railway corporation and common carrier of freight and passengers, was under statutory obligation to safely carry and care for, mails received for carriage by it, under the United States Statutes and regulations of and notification from the United States Post Office Department, for a compensation paid or to be paid to defendant by the United States Government, and in refusing to hold that defendant was liable to The German State Bank as owner of the registered package in question, for a loss caused or occasioned by defendant's own negligence or the negligence of defendant's employee, placed by defendant in the care or custody of mail received for carriage or carried by said defendant, while in the course of transmission and prior to the delivery of said mail to the Post Master or Post Mistress at the point of destination, the registered package in question having been lost in consequence of such negligence.

Eighth. The Court erred in holding that defendant and its night operator or night agent, or either of them, were public agents and engaged in the public service, when caring for or transporting the mail-sack containing the registered
4 package in question, it being admitted by demurrer that neither said defendant, nor said night operator or night agent, had been sworn into the Postal service of the United States.

Ninth. It being admitted, by demurrer, that defendant was not sworn into the Postal service of the United States, and that defendant's employee who received the mail-sack, containing the registered package in question, and took charge thereof, during the night and until delivered to the Post Master or Post Mistress at Harvey, on the following morning, was not sworn into the Postal service of the United States, the Court erred in refusing to hold that neither said defendant nor its said employee was a public agent, and that said defendant was not exempt from the rule of respondent superior, but was answerable for the negligence of itself and of its said employee, and liable to the owner for the loss of said registered package, caused by said negligence.

Tenth. The Court erred in refusing to hold that the exemption of a principal public agent from liability for the negligence of his employee, as a subordinate public agent, only obtains when such subordinate public agent is appointed by his principal, by virtue of some law expressly authorizing such appointment, and that under the facts alleged, defendant appointed its said night agent or night operator, independent of any express authority of law, and said night agent or night

operator was, therefore, the mere private employee of defendant, and defendant was subject to the rule of respondent superior as to the defaults or misfeasances on the part of its said employee, alleged in the Complaint.

Eleventh. The Court erred in holding that defendant and its night operator or night agent, or either of them, were public agents, and engaged in the public service while caring for the mail-sack, containing the registered package in question, it being admitted by demurrer, that defendant was a common carrier of passengers and freight by steam Railway, incidentally carrying the mails of the United States for a compensation paid or to be paid to defendant by the United States under the United States Statutes and regulations of and notification from the United States Post Office Department, and the said night operator, or night agent, was an ordinary employee or representative of defendant, incidentally caring for the United States mails received at defendant's station at Harvey.

Twelfth. The Court erred in refusing to hold that defendant as a Railway Corporation and common carrier of freight and passengers, was a common carrier of the United States mails and of the registered money package therein contained, owned by The German State Bank, received for carriage by it under the United States Statutes and regulations of and notification from the United States Post Office Department, and for a compensation paid or to be paid to defendant, by the United States Government, and erred in refusing to hold that defendant was liable, as such common carrier, for the negligence of said defendant or its employee, in the care or custody of mails, properly in its possession or custody, while in course of transmission to the post-office at Harvey, and prior to delivery thereof to the Post Master or Post Mistress at Harvey, said negligence having caused the loss of the registered package in question.

Thirteenth. The Court erred in refusing to hold that defendant, as a Railway Corporation and common carrier of freight and passengers, was a bailee for hire of the mails, and of the registered packages therein contained, received for carriage or carried by it, under the United States Statutes and regulations of and notification from the United States Post Office Department, for a compensation paid or to be paid to defendant by the United States Government, and in refusing to hold that defendant, as such bailee for hire, was liable to the German State Bank as the owner of such registered package, for the negligence of said defendant or its employee, in the care or custody of such mails, properly in its possession

or custody while in course of transmission to the Post Office at Harvey, and prior to its delivery to the Post Master or Post Mistress at Harvey, the loss of the registered package in question having occurred by reason of such negligence.

6 Fourteenth. The Court erred in holding that the failure of defendant to provide some room, receptacle or other place, in which to safely care for, guard or protect, under lock and key or other secure fastening, the United States mail-sack containing mail matter, in course of transmission through the United States mails, during the time such mail-sack was in the care or custody of defendant, between the time of its arrival at defendant's station at Harvey, and the time of the delivery of said mail, by defendant or its employee, to the Post Master or Post Mistress at the Town of Harvey, did not constitute negligence for which defendant was responsible to the German State Bank as the owner of registered mail matter lost by reason thereof, to the extent of the loss occasioned by defendant's said failure.

Fifteenth. The Court erred in holding that the failure of defendant to provide some competent person, duly sworn into the Postal service of the United States, at its station at Harvey, to receive United States mail from defendant's train, and to have charge of and to safely watch and guard the same during the night, from the time of the arrival of said mail at said station until the same was safely delivered, on the following morning, to the Post Master or Post Mistress at the town of Harvey, did not constitute negligence on the part of defendant, for which defendant was responsible to the German State Bank as the owner of a registered package lost by reason thereof, to the extent of the loss occasioned by defendant's said failure.

Sixteenth. The Court erred in holding that the failure of defendant to provide some room, receptacle or other place, in which to safely care for, guard or protect under lock and key, or other secure fastening, the United States mail-sacks containing mail matter in course of transmission through the United States mails, during the night, while such mail was in the care or custody of defendant, between the time of its arrival at defendant's station at Harvey, and the time of the delivery of said mail, on the following morning, by de-

7 fendant or its employee, to the Post Master or Post Mistress at the town of Harvey, together with the failure of defendant to provide some competent person, duly sworn into the United States Postal service, to efficiently watch, guard and protect said United States mail-sacks, under the circumstances above set forth, did not, in connection with all

the other facts alleged in the complaint, constitute negligence on the part of defendant for which defendant was responsible to the German State Bank as the owner of a registered package lost by reason thereof, to the extent of the loss occasioned by defendant's said failure.

Seventeenth. The Court erred in refusing to hold that defendant, while carrying the United States mails, under the statutes of the United States and the regulations established by and notification from the Post Office Department of the United States, for a compensation paid or to be paid to defendant by the United States, was under obligation to provide a safe place or receptacle, and to provide a competent person, duly sworn into the United States Postal service, to have the custody of said mail-sack, in order to keep safely the United States mail-sacks delivered to defendant or its employees, by the Postal clerk on defendant's postal car, at defendant's station at Harvey, for safe keeping during the night, and for subsequent tranmission to the Post Office at the town of Harvery, the distance from defendant's station to the Post office being less than eighty rods, and the Court further erred in holding that defendant was not liable to the German State Bank as the owner thereof, for the loss of a registered package contained in such mail-sack, which said loss was caused or occasioned by defendant's negligence in failing to provide such safe place or receptacle for the care and custody of said mail-sack and its contents, and in failing to provide an efficient and reliable employee to guard and protect such mail-sack and its contents, while in defendant's possession during the night in question, after the receipt of such mail-sack by defendant, and prior to its delivery at the Post Office in said town of Harvey.

8 Eighteenth. The Court erred in refusing to hold that, as several acts of negligence, for which defendant is responsible, are alleged in the complaint, it was not incumbent upon plaintiff to allege which one particular act of negligence led to or caused the loss, or to allege or prove what particular person got the registered package in question.

Nineteenth. The Court erred in refusing to hold that the Bankers Mutual Casualty Company, the substituted plaintiff, was, by operation of law, subrogated to all the rights of the German State Bank, the original owner of said registered package, including the right to maintain this action against defendant for the loss or damages arising from the loss of said registered package, through the negligence of defendant and defendant's employee, or either of them, while said registered package was in the custody of defendant, in course

of transmission through the United States mail and prior to the delivery thereof to the Post Master or Post Mistress at Harvey.

Twentieth. The Court erred in refusing to hold that under and by virtue of the provisions of the clause, on the subject of subrogation, contained in the policy of insurance issued by the Bankers Mutual Casualty Company to the German State Bank, this plaintiff was subrogated to all the rights of the original owner in and to said registered package, including the right to maintain this action for the loss of said registered package, caused by the negligence of defendant, and its employees, or either of them, while said package was in defendant's custody in course of transmission through the United States mails.

Twenty-first. The Court erred in refusing to hold that the German State Bank, the original owner of the registered package in question, had, in writing, duly assigned to this substituted plaintiff all of its right, title and interest in and to the registered package in question, including the right to maintain this action, for the loss of such registered package
9 through the negligence of defendant and its employee, or either of them, while in course of transmission through the United States mail.

Wherefore, this plaintiff prays that the said order and said final judgment be reversed, with all the costs of this suit.

January 10th, A. D. 1902.

H. F. DALE,
GEO. W. BOWEN and
HENRY CONLIN,
Attorneys for Plaintiff and Petitioner.

10 United States Circuit Court, District of Minnesota, Fourth Division.

Bankers Mutual Casualty Company, Plaintiff,

vs.

The Minneapolis, St. Paul and Sault Sainte Marie Railway Company, Defendant.

Petition for Writ of Error.

To the Honorable, the Circuit Court of the United States for the District of Minnesota, Fourth Division:

Your petitioner, the Bankers Mutual Casualty Company, would respectfully represent and show that in the above entitled cause pending in the United States Circuit Court in and for the District of Minnesota, Fourth Division, there was signed at the September Term, A. D. 1901, of said Court under the

date of on or about December 20, A. D. 1901, a final entry or judgment, and the same was filed for record on or about January 8, A. D. 1902, in favor of the said defendant and against this plaintiff, dismissing the complaint of the plaintiff on the merits and adjudging as against said plaintiff the costs of said action, greatly to the injury of your petitioner, and which said judgment and the proceedings prior thereto are erroneous and inequitable in many respects, for the reasons specified in the assignment of errors which is filed herewith, and plaintiff prays that this writ of error may be allowed, and that an order be made fixing the amount of security which the plaintiff shall give and furnish upon said writ of error, and petitioner prays that a transcript of the record, proceedings and papers upon which judgment was rendered duly authenticated, may be sent to the United States Circuit Court of Appeals of the Eighth Circuit in the time and manner provided by law.

Dated this 10th day of January, A. D. 1902.

H. F. DALE,
GEO. W. BOWEN and
HENRY CONLIN,
Attorney for Plff. and Petitioner.

10½ And now on this day, the petition of plaintiff in the above entitled cause for the allowance of a writ of error is hereby granted, and it is ordered that a writ of error issue as prayed therein, and that the amount of bond on said writ of error be, and hereby is, fixed at Five Hundred Dollars ($500.00).

Dated this 20th day of January, A. D. 1902.

WM. LOCHREN, Judge.

11 United States of America—ss.

The President of the United States, to the Honorable the Judges of the Circuit Court of the United States for the District of Minnesota—Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court before you, at the September Term, 1901, thereof, between the Bankers Mutual Casualty Company, plaintiff, and The Minneapolis, St. Paul and Sault Sainte Marie Railway Company, Defendant, a manifest error hath happened, to the great damage of the said Bankers Mutual Casualty Company as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things

concerning the same, to the United States Circuit Court of Appeals for the Eighth Circuit, together with this writ so that you have the said record and proceedings aforesaid, at the City of St. Louis, Missouri, and filed in the office of the Clerk of the United States Circuit Court of Appeals, for the Eighth Circuit, on or before the 21st day of March, 1902, to the end that the record and proceedings aforesaid being inspected, the United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws, and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 20th day of January, in the year of our Lord one thousand nine hundred and two. Issued at my office in the City of Minneapolis, with the seal of the Circuit Court of the United States for the District of Minnesota, Fourth Division, dated as aforesaid.

Seal
U. S. Circuit Court
Dist. of Minnesota,
Fourth Division.

HENRY D. LANG,
Clerk Circuit Court United States, District of Minnesota, Fourth Division.
By George F. Hitchcock, Jr., Deputy.

Allowed by;
WM. LOCHREN, Judge.

Ent. No. 509. United States Circuit Court, District of Minnesota, Fourth Div. Bankers Mutual Casualty Company vs. The Minneapolis, St. Paul & Sault Sainte Marie Railway Co. Writ of Error to the Circuit Court of the United States for the District of Minnesota, Fourth Division. Filed January 22, 1902, Henry D. Lang, Clerk. By Geo. F. Hitchcock, Jr., Deputy.

12 United States Circuit Court, District of Minnesota, Fourth Division.

Bankers Mutual Casualty Company, Plaintiff,
vs.
The Minneapolis, St. Paul and Sault Sainte Marie Railway Company, Defendant.

Cost Bond on Writ of Error.

Know All Men by These Presents:

That we, Bankers Mutual Casualty Company as principal, and United States Fidelity & Guaranty Company as surety, are held and firmly bound unto the Minneapolis, St. Paul and Sault Sainte Marie Railway Company in the full and just sum of Five Hundred Dollars ($500.00) to be paid to the said The Minneapolis, St. Paul and Sault Sainte Marie Railway Company, its successors or assigns: To which payment well and truly to be made we bind ourselves, our heirs, executors, administrators and successors, jointly and severally by these presents, sealed with our seals and dated this 10th day of January, in the year of our Lord one thousand nine hundred and two.

Whereas, lately at the September Term, A. D. 1901, of the Circuit Court of the United States for the District of Minnesota, Fourth Division, in a suit pending in said Court between the Bankers Mutual Casualty Company, a corporation and citizen of the State of Iowa, substituted as plaintiff, and the Minneapolis, St. Paul and Sault Sainte Marie Railway Company, defendant, a final judgment was rendered on or about the 20th day of December, A. D. 1901, and entered of record on or about January 8, A. D. 1902, in favor of the said defendant and against the said plaintiff and for the costs of said suit, and the Bankers Mutual Casualty Company, plaintiff therein, has obtained a writ of error of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the defendant The Minneapolis, St. Paul and Sault Sainte Marie Railway Company, citing and admonishing it, the said defendant, to be and appear in the United States Circuit Court
13 of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty (60) days from and after the date of said citation.

Now, the condition of the above obligation is such, that if the said Bankers Mutual Casualty Company shall prosecute said writ of error to effect, and answer all damages and costs

if said plaintiff fail to make goog its plea, then the above obligation to be void, also to remain in full force and virtue.

BANKERS MUTUAL CASUALTY COMPANY,
Principal.
By A. U. Quint, Treasurer.
THE UNITED STATES FIDELITY &
GUARANTY COMPANY, Surety, [Seal]
By Porterfield K. Witmer,
General Agent.

Sealed and delivered in the presence of,

.....
.....

By J. D. Wallingford,
Attorney in fact.

Approved this 20 day of January, A. D. 1902.

WM. LOCHREN,
Judge of the Circuit Court of the United States, District of Minnesota.

United States of America,
Southern District of Iowa,
Central Division—ss.

I, E. R. Mason, Clerk of the Circuit Court of the United States for the Southern District of Iowa, Central Division, do hereby certify that the surety in the foregoing Bond is good and sufficient and that I would accept and approve said Bond if presented to me for official action.

Dated at Des Moines, Iowa, this 14 day of January, A. D. 1902.

E. R. MASON,
Clerk of the Circuit Court of the United States, Southern District of Iowa.

[Seal U. S. Circuit Court.]

14 The United States of America, to The Minneapolis, St. Paul and Sault Sainte Marie Railway Company—Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this Citation bears date, pursuant to a writ of error filed in the Clerk's office of the Circuit Court of the United States for the District of Minnesota, Fourth Division, wherein the Bankers Mutual Casualty Company is Plaintiff in Error, and you are Defendant in Error, to show cause, if any there be, why the judgment rendered against the said Plaintiff in Error, as in said writ of error mentioned, should not be corrected, and

why speedy justice should not be done the parties in that behalf.

Witness, the Honorable William Lochren, Judge of the Circuit Court of the United States for the District of Minnesota, this 20th day of January in the year of our Lord one thousand nine hundred and two.

WM. LOCHREN, Judge.

Ent. No. 509. United States Circuit Court, District of Minnesota, Fourth Div. Bankers Mutual Casualty Company, vs. The Minneapolis, St. Paul & Sault Sainte Marie Ry. Co. Citation on Writ of Error. Service of the within citation is hereby admitted, this 22nd day of January, 1902. Alfred H. Bright, Defendant's Attorney. Filed January 22, 1902. Henry D. Lang, Clerk. By Geo. F. Hitchcock, Jr., Deputy.

15 United States Circuit Court, District of Minnesota, Fourth Division.

German State Bank, Plaintiff,

vs.

Minneapolis, St. Paul and Sault Ste. Marie Railway Company, Defendant.

Pleas before the Honorable the Judges of the Circuit Court of the United States of America for the District of Minnesota, for the September Term, A. D. 1901, of said Court, held in the city of Minneapolis in said district in the year 1901.

District of Minnesota—ss.

Be it remembered that on this seventeenth day of June, A. D. 1901, came the plaintiff above named by Dale & Allen and Geo. W. Bowen, its attorneys, and filed in the Clerk's office of said Court his complaint herein in the words and figures following, to wit:

16 In the United States Circuit Court, Fourth District of Minnesota.

German State Bank, a Corporation and Citizen of the State of North Dakota, Plaintiff,

vs.

Minneapolis, Saint Paul & Sault Sainte Marie Railway Company a Corporation and Citizen of the State of Minnesota, Defendant.

Complaint.

To the Honorable Judges of the United States Circuit Court, for the Fourth District of Minnesota:

Plaintiff brings this action for the use and benefit of the Bankers Mutual Casualty Company, a corporation and Citizen

of the State of Iowa, and for cause of action against the defendant alleges:

That the German State Bank is a corporation duly organized under the laws of the State of North Dakota, and a citizen of said state; with its principal place of business at the town of Harvey, in said State, engaged in a general banking business at said town, and said bank was engaged in said business on or about the 10th day of November, A. D. 1900.

That the Bankers Mutual Casualty Company is a corporation duly organized under the laws of the state of Iowa, and a citizen of said State, with its principal place of business at Des Moines in said State, engaged in the business of insuring banks against loss from robbery and burglary, including packages of money in course of transmission from place to place, while regularly carried in the United States registered mails.

That defendant is a corporation duly organized under the laws of the State of Minnesota and a citizen of said state, with its principal place of business at Minneapolis in said State, engaged in operating a line of railroad situated in the
17 States of Minnesota and North Dakota, and in the usual course of its business carrying the United States mails under the statutes and laws of the United States.

That on or about the 10th day of November, A. D. 1900, the Metropolitan Bank, a corporation organized under the laws of the State of Minnesota, was engaged in transacting a general banking business in the city of Minneapolis, in said State, and on or about said date, said bank deposited in the United States Mails, at Minneapolis, in said State, a package containing lawful money of the United States, commonly known and called currency, of the actual cash value of Three Thousand Dollars ($3,000.00), in an envelope properly addressed to the German State Bank, at Harvey, North Dakota, and prepaid thereon the postage and registration fee, and said package was thereupon duly registered by the Post Master of said post office. That from and after the time of depositing said package in said post office at Minneapolis, said package and its contents was the property of said German State Bank.

That said Registered package was covered by insurance and indemnity against loss while in transit through the United States mails from Minneapolis to said Harvey, under a policy of insurance issued by said Bankers Mutual Casualty Company, said insurance being for the use and benefit of said German State Bank. That a true copy of said policy is hereby attached as part hereof, and marked Exhibit "A."

That on or about November 10th, A. D. 1900, and while said package was in good safety and prior to the departure of the train carrying said registered package, said Metropolitan Bank deposited in the United States Mails, at the post office in said Minneapolis, a letter of advice, properly addressed to the Bankers Mutual Casualty Company at Des Moines, Iowa, with postage thereon prepaid; that said letter of advice notified said Bankers Mutual Casualty Company, of the shipment by said Metropolitan Bank, of the sum of Three Thousand Dollars to said German State Bank of Harvey, and upon said mailing of said letter of advice, the contract of insurance and indemnity of said Registered Package of currency immediately
18 attached thereto and became a valid and complete contract of insurance and indemnity by the said Bankers Mutual Casualty Company, in favor of said German State Bank.

That in the regular course of transmission of the United States mails, said registered package was duly delivered to defendant railroad company, to be carried by it, and was so carried to said Town of Harvey, North Dakota, and was then delivered to defendant's night station-agent or night operator, and said registered package was then and there stolen.

That the theft of said Registered Package, as above set forth, was caused by the negligence of defendant in not properly taking care of and protecting said registered package of currency; said negligence of said defendant being as follows, to wit:

That from and after the time of the depositing of the mail sack containing said currency in defendant's mail car at Minneapolis, Minnesota, for the purpose of transit and transportation for delivery at Harvey, North Dakota, the same was under the exclusive care, custody and control of the Postal Clerks, regularly employed and having charge of the mail in said car; that the mail sack containing said Registered Package, from and after the time of its delivery in said postal car, to the proper postal clerks therein, up to and including the delivery of said mail sack at Harvey, North Dakota, was in the exclusive care, custody and control of the said postal clerks or authorities.

That when said train and postal car arrived at Harvey, North Dakota, the postal clerk delivered said mail sack, duly locked, together with said registered package of currency therein contained, to the night station agent, or night operator of the defendant at said Harvey, that said night station agent, or operator, was not sworn as an official or employee of the post office department, as required by law, but was then and

there employed and duly authorized by the defendant to receive and take charge of the mail sack, containing said package of currency, and deposit same in defendant's depot, at Harvey, North Dakota, and did so receive, take charge of and deposit said mail sack.

19 That Section 713 of the postal laws and regulations of the United States of the year 1893, which was in force at the time of shipment of said registered package is in words and figures as follows:

"The railroad company will also be required to take the mails from and deliver them into all intermediate post offices and postal stations located not more than 80 rods from the nearest railroad station at which the company has an agent or other representative employed."

That said post office at Harvey was an intermediate post office and was located not more than 80 rods from defendant's railroad station at Harvey.

That under said postal regulation it was the duty of said defendant, through its night agent, or operator, or other representative employed by defendant, to safely care for and guard said mail sack and its contents during the night, and safely deliver the same at the post office to the post master in said town of Harvey, North Dakota.

That said night station agent, or night operator, after receiving said mail sack, containing said registered package, did negligently leave said depot, and did absent himself therefrom for a period of time to this plaintiff unknown, and thereby defendant failed to safely keep and care for said mail sack and its contents.

That one ..... Soule was then the road master or foreman of said defendant at said town of Harvey, and one of its employees and servants, but was not sworn in as an official or employee of the Post office department, as required by law.

That said Soule did previously unlawfully obtain and cause to be made, a key to said mail sack, and did enter said depot, and find said mail sack, which had previously been deposited therein, and did unlock the same, and abstract and take therefrom the aforesaid registered package, containing said Three Thousand Dollars ($3,000.00) in currency and did unlawfully convert the same to his use and benefit, and the same has never been delivered or returned to this plaintiff, or to the

20 Metropolitan Bank of Minneapolis, or to the Bankers Mutual Casualty Company, or anyone for them. That said Soule had access to the office or room in defend-

ant's said station or depot, where said mail sack was deposited, and was permitted to go and come therefrom, at will, all of which was well known to defendant.

That in consequence of said negligence of the defendant, and the consequent loss of said package, as herein stated, said Bankers Mutual Casualty Company became indebted to said German State Bank of Harvey under its said policy of insurance, and was compelled to and did pay said German State Bank the full amount of the loss so sustained by it, to wit: the sum of Three Thousand Dollars ($3,000.00) in good and lawful money of the United States; the same being the amount of insurance or indemnity, held by said German State Bank, and covered by said policy of insurance. That written demand has been made by said German State Bank and said Bankers Mutual Casualty Company upon the defendant, for repayment to them of said sum of money, a copy of which written demand is hereto attached, as part hereof, and marked Exhibit "B," which payment the defendants have refused and still refuse to make.

That by reason of said facts, plaintiff alleges, that plaintiff, for the use and benefit of said Bankers Mutual Casualty Company, has been damaged in the sum of Three Thousand Dollars ($3,000.00), with interest thereon at the rate of six per cent (6) per annum, from the 10th day of November, A. D. 1900, and said German State Bank hereby says and states that whatever recovery may be had, under and by virtue of the matters herein set forth, shall be for the use and benefit of its insurer, said Bankers Mutual Casualty Company, and said amount when collected and received by said German State Bank, shall inure to the benefit of said Company, and the same shall be in full settlement of all claims, of whatever kind or nature, arising out of the facts set forth in this petition.

Wherefore: plaintiff prays for judgment against defendant for the use and benefit of said Bankers Mutual Casualty Company in said sum of Three Thousand Dollars ($3,000.00)
21 with Six per cent (6) interest thereon from and after November 10th, 1900, and for the costs of this action; and that defendant be duly summoned to appear and answer this complaint, as required by law and the rules of this Court.

GEO. W. BOWEN and
DALE & ALLEN,
Attorneys for Plaintiff.

Geo. W. Bowen, of Carroll, Iowa,
Dale & Allen, of Des Moines, Iowa,
Of Counsel for Plaintiff.

State of Iowa,
Polk County—ss.

A. U. Quint, being first duly sworn, on oath deposes and says: That he is treasurer and Active Manager of the Bankers Mutual Casualty Company, named on the foregoing petition, and for whose use and benefit the foregoing suit is prosecuted; that he has read and knows the contents of the foregoing petition: that he has personal knowledge of the insurance of said German State Bank by said Bankers Mutual Casualty Company; that he has information, which he believes to be true as to all other facts set forth in said petition, and that the matters and things set forth in said petition are true as he verily believes. A. U. QUINT,

Subscribed in my presence and sworn to before me by A. U. Quint, above named, at Des Moines, Iowa, this 14 day of June, A. D. 1901.

[Seal] WILLIAM M. REX,
Notary Public, in and for Polk County, Iowa.

22 EXHIBIT A-1. (2464)

Bankers Mutual
Casualty Company.
(Shipping Policy)
Des Moines, Iowa,

By this policy of Insurance does insure German State Bank, Harvey, N. D. For account of themselves, In case of loss to be paid at Des Moines, Ia.; in funds current to German State Bank, Harvey, N. D.

On Currency, Bonds, Coupons, Certificates of Stock or other securities or valuables.

To cover risks of transportation from the time of deposit and registration at the Post Office, or delivery to an Express Company's Office until delivered at the place of address.

To cover shipments by the United States Registered Mail, or by Express within the United States, or between the United States and the Dominion of Canada, Kingdom of Great Britain and Ireland, or the Continent of Europe. Whether the aggregate sum exceed the amount of the subscription hereon or not, the premium on the excess of such subscription to be paid from time to time as soon as the amount of the same shall be known to the assured. This company having been paid the consideration for this insurance by the assured at and after the rate of on the subscribed amount on account.

Subject to the Following Conditions:

First. No risk to be considered as insured hereon until a letter addressed to the Company at Des Moines, Iowa, detailing particulars of mailing with description of the property and the amount to be insured, is deposited in the Post Office at the place of mailing, which must be done while the property is in good safety and in all cases prior to the departure of the mail or express which carries the property insured.

Second. The perils and risks assumed by the Bankers Mutual Casualty Company under this insurance are those of transportation, such as fires, floods, thefts, collisions of trains, and all detriment and misfortune, as well as those by water, that may come to the property hereby insured.

23 The risk to attach immediately following the mailing or shipping by express of the package and shall so continue until delivered to the address.

Third. This insurance is not to cover more than $10,000 by any one mail or express at one time.

Fourth. That all property insured under this policy shall be enclosed in a strong envelope or wrapper, well secured and in all cases sealed with wax.

Fifth. That the property insured under this policy shall be given its true value, and in case of under valuation of the property insured, no claim to be made for any amount above that originally stated in the letter of advice.

Sixth. That it is understood and agreed that this policy of insurance does not cover the loss by theft committed by one of the employes of the insured, or of the person or persons to whom or by whom the property was mailed.

Seventh. In case of loss, such loss to be paid within thirty days after proofs of loss and proof of interest; and in case of loss or misfortune, it shall be lawful and necessary to and for the insured to sue, labor and travel for, in and about the defense, safeguard and recovery of the property without prejudice to this insurance; and upon the payment of any loss under this policy, the assured or assigns, in consideration thereof, agree to convey to the said Bankers Mutual Casualty Company the unincumbered title in the property lost as absolute owners thereof, and to take all necessary measures in behalf, at the risk and expense, of the said Bankers Mutual Casualty Company, for the recovery, reissue or replacement of said property, where possible.

Eighth. It is warranted by the assured that the packing and sealing of the package containing the property insured hereunder, shall be witnessed by two adults, one of whom shall have charge of the same until deposited and registered at the Post Office, or delivered to the Express Company.

24 Ninth. It is agreed that no suit or action against this Company for the recovery of any claim by virtue of this policy shall be sustained in any Court of Law and Equity unless such suit or action shall be commenced within six months next after the date of mailing or shipment of the package claimed to be lost, and that the lapse of said period shall be a bar to any such suit or action.

Tenth. Warranted by the assured free from claim on account of capture, seizure, detention or destruction, by or arising from any belligerent nation, or by or from any officer. civil or military, or other person claiming to act in their name or under their authority or in their behalf.

Eleventh. In all cases of loss when it shall be claimed by the Bankers Mutual Casualty Company that the carrier or other party in whose custody the property may be at the time of such loss, is or may be liable, then the assured shall, at the request of this Company or its agents, assign and subrogate all their rights and claims to this Company, to an amount not exceeding the sum paid by said Company.

Twelfth. Warranted free from claim in any wise inuring to the benefit of carrier.

Thirteenth. This policy may be canceled by either party giving the other thirty days' notice in writing.

Fourteenth. Rates of Premium as agreed, and premiums due and payable on the last day of each month.

In witness whereof, the Bankers Mutual Casualty Company has caused this Policy to be executed at the city of Des-Moines, Ia., this 7 day of March, 1898, but this policy shall not be binding upon the Company until countersigned by a duly authorized representative of the Company.

J. M. WOODWORTH,
Secretary.

CHAS. P. HANNAN,
President.

Countersigned:
G. N. Sherman,
Assistant Secretary.

25 EXHIBIT A-2.

Rates of Insurance on Registered Mail Shipments, where the entire line of transportation is by railroad between any points in the State of North Dakota and the following Cities and any town in the States named. To be attached to and made a part of policy No. 2464 issued by the Bankers Mutual Casualty Company.

Dated Mch. 31, 1898.

Per $1000.	Securities.	Currency.	Currency. Not over 500.	Currency. Not over 200.
St. Louis, Mo.; Kansas City, Mo.....	35	60	50	40
St. Paul, Minn.; Minneapolis, Minn.....	15	20	15	10
New York City, N. Y.; Boston, Mass.....	45	75	60	50
Chicago, Ill.; Omaha, Neb.	30	50	40	30
All points to and from the New England States...	45	75	60	50
Between all points in North Dakota.....	15	20	15	10

Banks shipping currency or securities out of the States in which they are located shall be allowed the State rate within 100 miles.

26 EXHIBIT "B."

To the Minneapolis, St. Paul and Sault Sainte Marie Railroad Company, Thomas Lowry, President, C. F. Clermont, Secretary and Treasurer, and A. H. Bright, General Solicitor:

You are hereby notified, that we demand you for immediate settlement, and the payment to us of $3,000.00, being the amount of our loss, occasioned by the stealing of a package of currency amounting to $3,000.00, which was sent by the Metropolitan Bank of Minneapolis, [Minneapolis] Minnesota, to the German State Bank of Harvey, North Dakota, said loss being occasioned by your negligence, and the negligence of your employees, in not taking proper care thereof, and allowing same to be lost or stolen, same having been sent by express, and carried over your road, and unless we receive immediate settlement for said amount, and the payment of said sum of $3,000.00 we shall commence suit against you for the recovery thereof.

Dated this 12th day of February, 1901.

A. U. QUINT,

For German State Bank and for Bankers Mutual Casualty Co.

27 And on June 17th, 1901, the following praecipe for Summons was filed of record in said cause, viz:

28 Circuit Court of the United States, District of Minnesota, Fourth Division.

German State Bank,
vs.
Minneapolis, St. Paul & Sault Ste. Marie Ry. Co.

Praecipe for Summons.

To the Clerk of Above-Named Court:
Please issue Summons for the Defendant in the above entitled action.

DALE & ALLEN and
GEO. W. BOWEN,
Attys. for Plaintiff.

29 And on the same day the following summons was issued, the same was returned by the Marshal and filed of record in said cause on the twentieth day of June, A. D. 1901.

30 United States of America.
District of Minnesota,
Fourth Division—ss.

In the Circuit Court of the United States for the District of Minnesota:

German State Bank, a corporation and Citizen of the State of North Dakota, Plaintiff,
against
Minneapolis, St. Paul and Sault Ste. Marie Railway Company, a corporation and citizen of the State of Minnesota, Defendant.

Summons.

The President of the United States of America, to the Defendant above named—Greeting:

You are hereby summoned and required to answer the complaint in this action, which has been filed in the office of the Clerk of this Court, in Minneapolis, County of Hennepin, and State of Minnesota, and file your answer in said Clerk's office, within Twenty days after the service hereof, excluding the day of such service, and if you fail to answer the complaint as aforesaid, the plaintiff will take judgment against you for the sum of three thousand dollars ($3000.00) with six per cent

interest thereon from and after November 10th, 1900, and for the costs of this action.

For the Marshal of the District of Minnesota to excute.

Witness: The Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 17th day of June, A. D. 1901. Issued at my office in the City of Minneapolis, under the seal of said Circuit Court, the day and year last aforesaid.

[Seal U. S. Circuit Court.]

HENRY D. LANG, Clerk,
By Robert C. Mabey, Deputy.

Geo. W. Bowen and Dale & Allen,
Plaintiff's Attorneys.

31 Return on Service of Writ.

United States of America,
District of Minnesota—ss.

I hereby certify and return that I served the annexed Summons on the therein-named Minneapolis, St. Paul and Sault Ste. Marie Railway Company, a corporation, by handing to and leaving a true and correct copy thereof with Charles F. Clement, Secretary of said Corporation, personally at Minneapolis in said District on the 18th day of June, A. D. 1901.

WILLIAM H. GRIMSHAW,
U. S. Marshal.

32 And on July 8, 1901, the following answer was filed of record in said cause, viz:

33 In the United States Circuit Court, Fourth District of Minnesota.

German State Bank, a corporation and citizen of the State of North Dakota, Plaintiff,

vs.

Minneapolis, St. Paul & Sault Ste. Marie Railway Company, Defendant.

The defendant, answering the Complaint in the above entitled action,

1. Alleges that the plaintiff therein has no interest whatever in said action nor in the claim upon which the same is based; that it has no right to institute said action for the benefit of the Bankers Mutual Casualty Company referred to in said Complaint.

2. Further answering said Complaint, the defendant admits that the plaintiff is a corporation duly organized under the laws of the State of North Dakota, with its principal place of business in the Town of Harvey, in said State, and that it was engaged in a general banking business at the times mentioned in the Complaint.

Admits that the Bankers Mutual Casualty Company is a corporation duly organized under the laws of the State of Iowa, with its principal place of business at Des Moines in said State, and that it was engaged in the business set forth in said Complaint during the times therein mentioned.

Admits that the defendant is a corporation duly organized under the laws of the State of Minnesota, and is engaged in operating a line of railroad in the States of Minnesota and North Dakota and as such carried the United States mails.

Admits that the demand referred to in the Complaint and attached thereto as Exhibit "B" was made upon the defendant at the time alleged and that it refused payment on the same.

34 3. As to whether the Metropolitan Bank of the City of Minneapolis, sent the package of money by registered mail, as alleged in said Complaint, or whether the same was insured against loss as therein stated, or whether any such package was handled through the United States mail and by the mail clerks as therein stated, or as to whether the same was in the mail sack delivered at said Harvey at the time in question, or whether the same was stolen from said sack or not as therein stated, the defendant has no knowledge or information sufficient to form a belief and therefore denies the allegations in said Complaint contained relative to said matters.

4. Except as herein admitted, qualified or denied, the defendant denies each and every allegation, matter and thing in said complaint contained.

5. Wherefore, the defendant demands judgment that said action be dismissed and for its costs and disbursements herein.

ALFRED H. BRIGHT,
Attorney for Defendant.

35 And on July 9th, 1901, the following notice of appearance was filed of record in said cause, viz:

36 In the Circuit Court of the United States, District of Minnesota, Fourth Division.

German State Bank of Harvey, N. D., Plaintiff,
vs.
The Minneapolis, St. Paul & Sault Ste. Marue Ry. Co., Defendant.

To the Clerk of said Court:
Please enter my apearance in the above entitled cause as one of counsel for the plaintiff.

HENRY CONLIN,
21 Nat'l Ger. Am. Bank Bldg., St. Paul, Minn.
July 9th, 1901.

37 And on July 18th, 1901, the following demurrer to answer was filed of record in said cause, viz:

38 In the United States Circuit Court, Fourth District of Minnesota.

German State Bank, a corporation, and citizen of the State of North Dakota, Plaintiff,
vs.
Minneapolis, St. Paul & Sault Ste. Marie Railway Company, Defendant.

Comes now the plaintiff in the above entitled action and demurs to so much of the answer of the defendant herein as is contained in paragraph numbered one of said answer and to each and every part of said answer so far as the same relates to the separate defense pleaded in said paragraph one of said answer upon the ground and for the reason that the matters and things alleged in said paragraph one of said answer do not constitute a defense to said action.

Dated July 18th, 1901.

GEORGE W. BOWEN,
HENRY CONLIN,
Attorneys for Plaintiff.

DALE & ALLEN,
Of Counsel.

I hereby certify that in my opinion the foregoing demurrer is well founded in law.

HENRY CONLIN,
Attorney for plff.

38½ And on August 31st, 1901, the following proceedings of court were entered of record in said cause:

38½ United States Circuit Court for the District of Minnesota, Fourth Division.

Term Minutes, March Term, A. D. 1901, August 31st, 1901.

Saturday Morning.

Court opened pursuant to adjournment.

Present: Honorable William Lochren, Judge; William H. Grimshaw, U. S. Marshal; Henry D. Lang, Clerk; by Geo. F. Hitchcock, Jr., Deputy.

German State Bank of Harvey, N. D.,
vs.
Minneapolis, St. Paul & Sault Ste. Marie Railway Company,

The above entitled cause coming on to be heard upon the demurrer of the defendant to the complaint herein, the answer herein and the demurrer thereto having been withdrawn by consent of counsel for both parties made in open court, Mr. Alfred H. Bright is heard on behalf of the defendant in support of said demurrer, and Messrs. H. F. Dale, G. W. Bowen and Henry Conlin on behalf of the plaintiff and in opposition thereto, and thereupon said cause is duly submitted and by the Court taken under advisement.

39 And on September 18, 1901, the following demurrer to the complaint was filed of record in the said cause, viz:

40 United States Circuit Court, District of Minnesota, Fourth Division.

German State Bank, a corporation and citizen of the state of North Dakota, Plaintiff,
vs.
Minneapolis, St. Paul & Sault Ste. Marie Railway Company, a Corporation and Citizen of the State of Minnesota, Defendant.

Demurrer.

The above named defendant by Alfred H. Bright its attorney, demurs to the Complaint of the plaintiff in this action and specifies as grounds of objection thereto that it appears upon the face of the said Complaint,

1. That the same does not state facts sufficient to constitute a cause of action;

2. That there is a defect of parties plaintiff in this action in this, to wit, that it appears in said Complaint that the plaintiff therein has no interest whatever in said action nor in the claim

upon which the same is based; that if any cause of action exists on the facts stated, the real party in interest is the Bankers' Mutual Casualty Company referred to in said Complaint.

ALFRED H. BRIGHT,
Attorney for Defendant.

41 And on September 18th, 1901, the following order sustaining demurrer was filed of record in said cause. to-wit.

42 United States Circuit Court, District of Minnesota,
Fourth Division.

German State Bank
vs.
Minneapolis, St. Paul and Sault Ste. Marie Railway Co.

Decision.

This case is presented by demurrer to the complaint, which alleges in substance that on Nov. 10, 1900, the Metropolitan Bank deposited in the United States Mail at Minneapolis, in a pre-paid and duly registered letter or package, addressed to the plaintiff at Harvey, North Dakota, the sum of $3000 in currency, which therefore became the property of the plaintiff; who was then insured against the risks of transportation of such money by the Bankers Mutual Casualty Company of Des Moines, Iowa, under a policy of insurance, a copy of which is attached to the Complaint. The mail sack containing said package was carried in a mail car in defendants' railroad from Minneapolis to Harvey, under the exclusive control of Postal Clerks, who delivered said mail sack, duly locked and containing said package to defendants night station agent at said Harvey, who was not an employee of the Post Office Department, and whose duty, on behalf of defendant, it was to safely care for and guard said mail sack and its contents during the night, and safely deliver the same to the postmaster at the Harvey post office, which was within eighty rods of the railway station.

The night station agent deposited the mail sack in a room in the depot, and absented himself therefrom for a time, during which one Soule, a road master or foreman of defendant, entered the room, and with a key which he had caused to be made, unlocked the mail sack, and took said package, and stole the money. The Bankers Casualty Company, pursuant to its contract of insurance, has paid said sum of $3000 to the plaintiff, who brings this suit for the benefit of the in-
43 surer.

I. The Federal Government has from the first, assumed the absolute and exclusive control and performance of the postal service of the country, under the express provision of the Constitution authorizing Congress to establish post offices and post roads. The function so exercised is governmental, as it is calculated to produce revenue, more or less as the policy of the government may dictate; and it is intended to minister to the general welfare, by furnishing to all persons, and between all parts of the country, and reaching to other countries, means of communication, as rapid and safe as can be devised; and protected by the safeguards provided by law.

The government prescribes what matter shall be mailable, and the rates of postage, and the manner of payment of the same. These matters are regulated by law and are not left open for negotiation or contract. No idea of contract has any place in the scheme. The government tolerates no competitor in the exercise of this function, but forbids under penalties, the sending or carrying of sealed letters otherwise than in its mails. It permits but does not compel the sending of packages, which may contain articles of value, in its mails; but if a person avails himself of this permission the package enters the mail and is entitled to the same care as any letter and no greater. The provision for registration applies equally to letters and other packages, and only aids in tracing their course and carriage. The government, itself, receives, handles, assorts and carries the mails, and delivers the same as addressed. The postal officials of whatever grade, and carriers of whatever kind, are the servants of the government—the hands which it employs in the performance of its functions. With the exceptions presently to be mentioned, I think it may be safely asserted that these servants are not in privity with and owe no duty to any one except the government, to whom their fidelity is sought to be assured by provisions of the postal laws, penal and otherwise.

The exceptions are the cases where the duty of such servant, whether postmaster, clerk or distributing carrier, requires him to assume to do an act personal to a known or designated individual; such as receiving from him a letter or package
44 to be placed in the mail, in which case he would owe him the duty of using ordinary care to place it in the mail or in the proper receptacle for mailing; or if such servant should receive through the mail a letter or package which it became his duty to deliver to the person addressed, he would owe that person the duty of using ordinary care in making safe and prompt delivery of the same.

A Railway company carrying the mails, does not assume as to them, any of the duties or responsibilities of a common car-

rier. No one but the government can require or receive such service, and the duties and responsibilities of such railway carrier of mails are measured by the terms of the contract, and by the provisions of the postal laws and regulations. The mails are not in the care, custody or control of the railway company during the carriage, but under exclusive control of the railway postal clerks, in separate cars or compartments, fitted especially for that service. As to the safety of the persons of such clerks the railway company assumes the same duty which rests upon it respecting other persons lawfully being carried on its trains. But as to the mail itself it has no duty except what it owes the government, its employer. It has no notice or means of knowledge of the contents of mail sacks; nor as to who has sent or who is entitled to receive the letters or packages. It never was employed by such persons, has no privity with them, and owes to them severally and personally no duty whatever.

Were it otherwise, then when as often happens, cars are wrecked and burned, and the mail destroyed, as the result of negligence for which the railway company is in law responsible, so that recoveries against it are had for personal injuries, and for all destruction of luggage and merchandise, the courts would be burthened with actions to recover for the loss of valuable packages claimed to have been in the mail; affording such opportunity for fictitious claims, as might speedily compel railways to refuse such hazardous employment. The fact that no such litigation has ever arisen is decisive against the claim that a railway company owes any duty to the sender or addressee or owner of the contents of any letter or package contained in the mails, which can be made the basis of an action at law.

As above stated, the law requires that all letters sent from place to place, be sent by the mail. But there is no such requirement in respect to valuable packages; which may lawfully be sent through express companies, or by other responsible carriers. The postal service has become so efficient, speedy and safe, that in view of its cheapness many persons send valuable packages by post, taking the risk themselves, rather than pay more to responsible carriers, who make charges with some reference to the value of the article, and consequent amount of the risk assumed.

2 But if it were conceded that under some circumstances, an action of this kind can be maintained by the owner of a package lost from the mail, against a railway carrier of the mail, no liability can arise under the facts stated in this complaint. If any privity can be imagined as existing between the

railway carrier between distant places and the owner of a package in the closed mail sack, and that the railway company owes such package owner a duty to exercise care in the carriage of that especial package, it would not be that degree of care and of responsibility which rests upon a common carrier, but at most, the reasonable care which an ordinary bailee for hire must exercise in respect to the article which is the subject of the bailment. There is in such case no responsibility if the article is stolen, even by a servant of the bailee, if the bailee has taken and caused to be taken reasonable care under the circumstances.

Under the allegations of the complaint, and upon the theory of the concession suggested, the bailment would not cease until the mail sack containing the package was delivered at the post office, at Harvey; which was within eighty rods of defendants depot. It is alleged that the mail sack was delivered to defendants night station agent, whose duty it was "to safely care for and guard said mail sack and its contents
46 during the night." It must inferred from this, that the mail sack reached that depot too late in the night to be received at the post office before the following morning, and hence must be stored in the depot, as in a warehouse for the night. There is no allegation that it was not put in a safe place in the depot, guarded by such sufficient locks as would be reasonable in such case. The only attempted allegation of negligence is that the night station agent, after receiving the mail sack "did negligently leave said depot, and did absent himself therefrom for a period of time to this plaintiff unknown, and thereby defendant failed to safely keep and care for said mail sack and its contents." As I cannot hold that defendants duty in respect to the mail sack under the circumstances required that the station agent should sit on the mail sack the balance of the night, and keep awake, I think the allegation just quoted fails to charge any negligence.

The remaining allegations are to the effect that one Soule, a road master or foreman of the defendant at Harvey, entered the depot, and with a false key opened the mail sack and stole the package of money. The employment of Soule by the defendant, and the allegation that he had "access to the office or room where said mail sack was deposited, and was permitted to go and come therefrom at will," does not sustain any inference of lack of reasonable care. No facts are stated tending to show that defendant had any reason to regard Soule as other than honest and trustworthy; and the responsible character of his employment indicates that he was so regarded. The allegation that he had access to the room and was "permitted to go and come therefrom at will," with defendant's

knowledge, is too vague and indefinite, and requires too heavy a draft on the imagination to lead me to regard it as a statement that Soule had, with defendants knowledge and consent, such access or permission in the night time, or at any time other than when the occupations of his employment might properly direct him there.

47 The statement of the second ground of demurrer only specifies what may be a separate reason for sustaining the demurrer on the general ground.

The demurrer is sustained with leave to the plaintiff to amend its complaint on or before the November Rule Day.

WM. LOCHREN,
Judge.

48 And on October 30th, 1901, the following stipulation was filed of record in said cause, viz.:

49 In the United States Circuit Court. Fourth District of Minnesota.

The German State Bank of Harvey, North Dakota, Plaintiff,
vs.
The Minneapolis, St. Paul & Sault Ste. Marie Railway Company, Defendant.

It is hereby stipulated between the parties to the above entitled action as follows:

Defendant having demurred to the complaint of the plaintiff, on the ground that said complaint did not state facts sufficient to constitute a cause of action, and on the further ground that the above named plaintiff was not the real party in interest, and the court having sustained said demurrer upon the first of said grounds, with leave to said plaintiff to file an amended complaint on or before November, 1901, rule day of said Court, defendant consents and agrees that plaintiff in filing such amended complaint may substitute the Bankers Mutual Casualty Company, a corporation, of Des Moines, Iowa, as plaintiff, in said action in the place and stead of said German State Bank.

It is further stipulated that the demurrer heretofore interposed by defendant to the original complaint of plaintiff shall stand for and be a demurrer to said amended complaint when said complaint is filed.

Dated October 30th, 1901.

DALE & ALLEN,
GEO. W. BOWEN and
HENRY CONLIN.
Attorneys for Plaintiff.
ALFRED H. BRIGHT,
Attorney for Defendant.

50 And on the same day the following amended and substituted complaint was filed of record in said cause, viz.:

51 In the United States Circuit Court. District of Minnesota. Fourth Division.

Bankers Mutual Casualty Company, a Corporation and Citizen of the State of Iowa, Substituted as Plaintiff in lieu of the German State Bank, Original Plaintiff,

vs.

The Minneapolis, Saint Paul and Sault Ste. Marie Railway Company, a corporation and citizen of the State of Minnesota, Defendant.

Amended and Substituted Complaint.

To the Honorable Judges of the United States Circuit Court, for the Fourth District of Minnesota;

By leave of Court first had and obtained, the Bankers Mutual Casualty Company, heretofore substituted as plaintiff in lieu of the original plaintiff, the German State Bank, of the Town of Harvey in the State of North Dakota, respectfully shows the Court, and as a cause of action againt defendant, alleges as follows, to-wit:

That the Bankers Mutual Casualty Company, during all of the year A. D. 1900, and up to the present time, is and was a corporation, duly organized under the laws of the State of Iowa, and a citizen of said state, with its principal place of business at Des Moines, in said State engaged in the business of insuring banks against loss from robbery and burglary, including the insurance against loss of packages of money, while in the course of transmission from place to place, while regularly carried in the United States registered mails.

That defendant, during all of the year A. D. 1900, and up to the present time, is and was a Corporation, duly organized under the laws of the State of Minnesota and a citizen of said State with its principal place of business at Minneapo-
52 lis, in said State, engaged in operating a line of railroad situated in the States of Minnesota and North Dakota.

That the German State Bank, during all of the year A. D. 1900, and up to the present time, is and was a Corporation, duly organized under the laws of the State of North Dakota, and a citizen of said State; with its principal place of business at the town of Harvey, in said State, engaged in a general banking business at said town.

That during the whole year A. D. 1900, and up to the present time, defendant is and was engaged in carrying the United

States mails between the terminal and intermediate stations located upon and along its said line of railroad, under and by virtue of the Statutes and laws of the United States, and the regulations established by the Postoffice Department of the United States Government and in pursuance of a fixing of the compensation to be paid to defendant by the United States Government for carrying said mails and the person in charge thereof, based upon the last preceding reweighing of said mails and upon notice in writing, in the usual form, from the Second Assistant Postmaster General of the United States, requiring defendaant to carry said mails and the person in charge thereof.

That said depot, at or near the town of Harvey, was an intermediate station on that part of defendant's said line of Railroad within the State of North Dakota, which extends from the Station at Hankinson to the station at Portal, and the Railroad line between said Stations at Hankinson and Portal is designated by and known to the Postoffice Department of the United States, as Railroad Route No. 161,018, being a distance of 344.58 miles, and the compensation fixed by the United States Postoffice Department to be paid annually by the United States to Defendant, during all of the period herein referred to for the carriage of said mails and the person in charge thereof is and was the sum of sixty-four thousand eight hundred and fifteen and 49/100 dollars ($64,815.49) at the rate of $188.10 per mile.

53 That this substituted plaintiff is not in possession of the aforesaid notice to defendant, and is unable to attach to this petition said notice or a true copy thereof.

That during all of the period hereinbefore referred to, there was no contract of any kind between defendant and the United States Government, concerning or providing for the carriage, by defendant, of said mails, or any part thereof, or of the person in charge of said mails, upon or along defendant's said line of railway or any part thereof.

That on or about the 10th day of November, A. D. 1900, the Metropolitan Bank, a corporation organized under the laws of the State of Minnesota, was engaged in transacting a general banking business in the city of Minneapolis, in said State, and on or about said date, said bank deposited in the United States Mails, at Minneapolis, in said State, a package containing lawful money of the United States, commonly known and called currency, of the actual cash value of Three thousand dollars ($3,000.00), in an envelope properly addressed to the German State Bank, at Harvey, North Dakota, and prepaid thereon the postage and registration fee, and said package

was thereupon duly registered by the Post Master of said post-office. That from and after the time of depositing said package in said postoffice at Minneapolis, said package and its contents was the property of said German State Bank.

That said Registered package was covered by insurance and indemnity against loss while in transit through the United States mails from Minneapolis to said Harvey, under a policy of insurance issued by said Bankers Mutual Casualty Company, the substituted plaintiff, said insurance being for the use and benefit of said German State Bank. That a true copy of said policy is hereto attached as part hereof, and marked Exhibit "A."

That on or about November 10th, A. D. 1900, and
54 while said package was in good safety and prior to the departure of the train carrying said registered package, said Metropolitan Bank deposited in the United States Mails, at the postoffice in said City of Minneapolis, a letter of advice, properly addressed to said Bankers Mutual Casualty Company at Des Moines, Iowa, with postage thereon pre-paid, that said letter of advice notified said Bankers Mutual Casualty Company, of the shipment by said Metropolitan Bank of said sum of Three Thousand Dollars to said German State Bank of Harvey, and upon said mailing of said letter of advice, the contract of insurance and indemnity of said Registered package of currency immediately attached thereto and became a valid and complete contract of insurance and indemnity by the said Bankers Mutual Casualty Company, in favor of said German State Bank.

That in the regular course of transmission of the United States mails between the said City of Minneapolis and the said Town of Harvey, said Registered package was duly delivered by the Postoffice officials of said City of Minneapolis to the Railway Mail clerk or other proper postal official, and placed in a Railway mail-car or other proper car, the property of defendant, then standing upon defendant's said line of Railway, and was transported by defendant Railway Company to defendant's Railway Depot or Station, situated in or near said Town of Harvey, North Dakota.

That prior to the arrival of said Registered package at said Town of Harvey, the same, together with other registered mail packages and other mail matter, was, by said Railway Mail Clerk in charge of said mails, duly enclosed in a regular United States mail-sack or mail-pouch, which said mail-sack or mail-pouch was securely locked or fastened by the official government strap and lock.

That from and after the time of the depositing of the mail sack containing said currency in defendant's mail-car at Minneapolis, Minnesota, for the purpose of transit and transportation for delivery at Harvey, North Dakota, the same was
55 under the exclusive care, custody and control of the postal clerks, regularly employed by the United States Government and in charge of the mail in said car; that the mail sacks containing said registered package, from and after the time of its delivery in said postal car, to the proper postal clerks therein, up to and including the delivery of said mail sack at Harvey, North Dakota, was in the exclusive care, custody and control of the said postal clerks or authorities.

That upon the arrival of defendant's said train and postal-car at said Town of Harvey, North Dakota, said railway mail-clerk or other postal official, between eleven and twelve o'clock of said night, delivered said mail sack, duly locked, together with said registered package of currency therein contained to one James Magson, the night station agent, or night operator of defendant at said Town of Harvey, that said night station agent, or night operator, was not sworn as an official or employee of the Postoffice department of the United States Government, as required by law, but was then and there employed and duly authorized by the defendant to receive and take charge of all mail matter received over defendant's said line of Railway, at said Town of Harvey, including the mail-sack or mail-pouch containing said package of currency, and to deposit same in defendant's depot, at Harvey, North Dakota, and did so receive, take charge of and deposit said mail sack, or mail pouch.

That defendant was not sworn as an official or employee of the Postoffice Department of the United States Government, and had not subscribed or sworn to any oath relating to or concerning the carriage of the United States Mails, or the performance of defendant's duties as such carrier of the mails.

That Section 713 of the postal laws and regulations of the United States of the year A. D. 1893, which was in force at the time of the receipt and transmission of said registered postage is in words and figures as follows, to wit: "The railroad company will also be required to take the mails from and deliver them into all intermediate post offices and postal stations located not more than 80 rods from the nearest railroad station at which the company has an agent or other representative employed."

That said Postoffice at Harvey was an intermediate postoffice and was located not more than 80 rods from defendant's railroad station, or depot, at, or near said Town of Harvey.

56 That under said postal regulation it was the duty of said defendant to provide a sufficient and safe receptacle or place for the safety and security of said mail, while in its said custody, also to safely care for and guard said mail sack and its contents during the night, also to safely deliver the same to the post master or post mistress at the Post Office in said Town of Harvey, North Dakota.

But neglecting its said duty in the premises, defendant wholly failed and neglected to provide any receptacle or place for the safe or secure keeping of mail, and also failed to place a duly sworn official in charge of said mail-sack and further wholly failed to safely care for or guard said mail-sack and its contents, and also wholly failed to safely deliver the same, at the Postoffice to the Postmaster in said Town of Harvey. That by reason of defendant's said negligence, some person, to this plaintiff unknown, in some manner not known to this plaintiff, obtained access to said mail-sack and opened the same and abstracted or took therefrom said registered package whereby the same was wholly lost to said German State Bank.

That one, George A. Soule, was then the road master or foreman employed by said defendant at said town of Harvey, or one of defendant's employees or servants, but was not sworn in as an official or employee of the Postoffice department, as required by law, and was not authorized or employed by defendant to take charge of said mail-sack or to perform any duty in relation thereto and had no right of access to said mail sack, or to the mail therein contained, by virtue of his said employment by defendant.

That said Soule had previously unlawfully obtained and caused to be made, a key to the United States Government mail-sacks or mail-pouches, and personally, or with the aid and assistance of some person or persons, to this plaintiff unknown, did enter one of the rooms contained in the said depot building, where said mail-sack or mail-pouch had been placed by defendant's operator or night agent, on the floor or wall of said room, and not in any separate room, closet or
57 other safe receptacle, capable of being securely fastened against any intruder or unauthorized person, by lock and key or otherwise. That said room was not designed for or capable of safely keeping valuable articles or property.

That said Soule, or other person, had no right of access to said room, or to said mail-sack or mail-pouch, but through the negligence of defendant and its said night operator or night agent as set forth in this complaint, did gain entrance to said room and obtain access to said mail-sack or mail pouch, and

the mail-matter therein contained, and did find said mail-sack or mail-pouch situated or placed as above set forth, so that the same was readily accessible to any person gaining entrance to said room, and did find said mail-sack or mail-pouch wholly unprotected and unguarded by said night operator or otherwise.

That said Soule, or other person, by reason of the aforesaid negligence of said defendant and its said night agent or night operator, did obtain access to said mail-sack or mail-pouch and did unlock the same and abstract and take therefrom the aforesaid registered package, containing said Three Thousand Dollars ($3000.00) in currency and did unlawfully convert the same to his use and benefit, and the same has never been delivered or returned to said German State Bank or to said Metropolitan Bank of Minneapolis, or to this plaintiff, the Bankers Mutual Casualty Company, or to any one for the benefit of any of them.

That in consequence of the loss of said package, as hereinabove stated, said Bankers Mutual Casualty Company substituted plaintiff, became indebted to said German State Bank of Harvey under its said policy of insurance, and was compelled to and did pay said German State Bank the full amount of the loss so sustained by it, to wit: the sum of Three Thousand Dollars ($3,000.00) in good and lawful money of the United States; the same being the amount of insurance or indemnity held by said German State Bank, and covered
58 by said policy of insurance. That written demand has been made by said German State Bank and said Bankers Mutual Casualty Company of and from defendant, for repayment to them or one of them of said sum of Three Thousand Dollars, a copy of which written demand is hereto attached, as part hereof, and marked Exhibit "B," which payment defendant has refused and still refuses to make.

That by reason of the foregoing facts, the said Bankers Mutual Casualty Company has been and is now subrogated to all rights and remedies, which said German State Bank of Harvey had against defendant, to recover the sum of Three Thousand Dollars, so lost, with interest on said sum from and after the 10th day of November, A. D. 1900.

That for the purpose of further effectuating the rights of subrogation of this substituted plaintiff, against defendant, and to enable it to recover from defendant the sum so lost, said German State Bank, in writing, transferred and assigned to the plaintiff all of its rights in and to said money lost, and to sue for the recovery thereof. A true copy of said instru-

ment of assignment is hereto attached, as part hereof, and marked "Exhibit C."

Wherefore: the Bankers Mutual Casualty Company, substituted plaintiff, prays for judgment against defendant in said sum of Three Thousand Dollars ($3,000.00) with interest thereon at the rate of six per cent per annum from and after November 10th, 1900, and for costs of this action; and that defendant be required to appear and plead to this complaint, in the time and manner required by law and the rules of this court.

DALE & ALLEN,
G. W. BOWEN and
HENRY CONLIN,
Attorneys for Substituted Plaintiff.

Dale & Allen of Des Moines, Iowa,
G. W. Bowen, of Carroll, Iowa,
and Henry Conlin of Saint Paul, Minnesota,
Of Counsel for Plaintiff.

59 State of Iowa,
Polk County—ss.

George N. Sherman, being first duly sworn, on oath deposes and says: That he is Assistant Secretary of the Bankers Mutual Casualty Company, named as substituted plaintiff in the above entitled action; that he has read and knows the contents of the foregoing complaint; that he has personal knowledge of the insurance of said German State Bank by said Bankers Mutual Casualty Company; that he has information which he believes to be true as to all other facts set forth in said Substituted complaint, and that the matters and things set forth in said Substituted Complaint are true as he verily believes.

G. N. SHERMAN

Subscribed in my presence and sworn to before me by G. N. Sherman above named, at Des Moines, Iowa, this 25th day of October, A. D. 1901.

[Notarial Seal]. J. B. BLANK,
Notary Public in and for Polk County, Iowa.

60 Bankers Mutual
Casualty Company.
(Shipping Policy.)
Des Moines, Iowa.

By this policy of Insurance does insure German State Bank, Harvey, N. D., For account of themselves, In case of loss to be paid at Des Moines, Ia., in funds current to German State Bank, Harvey, N. D.

On Currency, Bonds, Coupons, Certificates of Stock and other securities or valuables.

To cover risks of transportation from the time of deposit and registration at the Post Office, or delivery to an Express Company's Office until delivered at the place of address.

To cover shipments by the United States Registered Mail, or by Express within the United States, or between the United States and the Dominion of Canada, Kingdom of Great Britain and Ireland, or the Continent of Europe. Whether the aggregate sum exceed the amount of the subscription hereon or not, the premium on the excess of such subscription to be paid from time to time as soon as the amount of the same shall be known to the assured. This company having been paid the consideration for this insurance by the assured at and after the rate of ..... on the subscribed amount on account.:

Subject to the Following Conditions:

First. No risk to be considered as insured hereon until a letter addressed to the Company at Des Moines, Iowa, detailing particulars of mailing with description of the property and the amount to be insured, is deposited in the Post Office at the place of mailing, which must be done while the property is in good safety and in all cases prior to the departure of the mail or express which carries the property insured.

Second. The perils and risks assumed by the Bankers Mutual Casualty Company under this insurance are those of transportation, such as fires, floods, thefts, collisions of trains,
61 and all detriment or misfortune, as well as those by water, that may come to the property hereby insured.

The risk to attach immediately following the mailing or shipping by express of the package and shall so continue until delivered to the address.

Third. This insurance is not to cover more than $10,000 by any one mail or express at one time.

Fourth. That all property insured under this policy shall be enclosed in a strong envelope or wrapper, well secured and in all cases sealed with wax.

Fifth. That the property insured under this policy shall be given its true value, and in case of under valuation of the property insured, no claim to be made for any amount above that originally stated in the letter of advice.

Sixth. That it is understood and agreed that this policy of insurance does not cover the loss by theft committed by one of the employes of the insured, or of the person or persons to whom or by whom the property was mailed.

Seventh. In case of loss, such loss to be paid within thirty days after proof of loss and proof of interest; and in case of loss or misfortune, it shall be lawful and necessary to and for the insured to sue, labor and travel for, in and about the defense, safeguard and recovery of the property without prejudice to this insurance; and upon the payment of any loss under this policy, the assured or assigns, in consideration thereof, agree to convey to the said Bankers Mutual Casualty Company the unincumbered title in the property lost as absolute owners thereof, and to take all necessary measures in behalf, at the risk and expense, of the said Bankers Mutual Casualty Company, for the recovery, reissue or replacement of said property, where possible.

Eighth. It is warranted by the assured that the packing and sealing of the package containing the property in-
62 sured hereunder, shall be witnessed by two adults, one of whom shall have charge of the same until deposited and registered at the Post Office or delivered to the Express Company.

Ninth. It is agreed that no suit or action against this Company for the recovery of any claim by virtue of this policy shall be sustained in any court of Law or Equity unless such suit or action shall be commenced within six months next after the date of mailing or shipment of the package claimed to be lost, and that the lapse of said period shall be a bar to any such suit or action.

Tenth. Warranted by the assured free from claim on account of capture, seizure, detention or destruction, by or arising from any belligerent nation, or by or from any officer, civil or military, or other person claiming to act in their name or under their authority or in their behalf.

Eleventh. In all cases of loss when it shall be claimed by the Bankers Mutual Casualty Company that the carrier or other party in whose custody the property may be at the time of such loss, is or may be liable, then the assured shall, at the request of this Company or its agents, assign and subrogate all their rights and claims to this Company to an amount not exceeding the sum paid by said Company.

Twelfth. Warranted free from claim in any wise inuring to the benefit of the carrier.

Thirteenth. This policy may be canceled by either party giving the other thirty days' notice in writing.

Fourteenth. Rates of premium as agreed, and premiums due and payable on the last day of each month.

In Witness Whereof, the Bankers Mutual Casualty Company has caused this policy to be executed at the city of Des Moines, Iowa, this 7 day of March, 1898, but this policy shall not be binding upon the Company until countersigned by a duly authorized representative of the Company.

63 CHARLES P. HANNAN, President. J. M. WOODWORTH, Secretary.

Countersigned:

G. N. SHERMAN, Assistant Secretary.

Exhibit "A," Sheet One.

64 Rates of Insurance on Registered Mail Shipments,

where the entire line of transportation is by railroad between any points in the State of North Dakota and the following Cities and any town in the States named. To be attached to and made a part of policy No. 2464 issued by the Bankers Mutual Casualty Company.

Dated Mch. 31, 1898.

Per $1000.	Securities.	Currency.	Currency. Not over 500.	Currency. Not over 200.
St. Louis, Mo.; Kansas City, Mo.....	35	60	50	40
St. Paul, Minn.; Minneapolis, Minn.....	15	20	15	10
New York City, N. Y.; Boston, Mass.....	45	75	60	50
Chicago, Ill.; Omaha, Neb.	30	50	40	30
All points to and from the New England States...	45	75	60	50
Between all points in North Dakota.....	15	20	15	10

Banks shipping currency or securities out of the States in which they are located shall be allowed the State rate within 100 miles.

65 From Bankers Mutual Casualty Company, Des Moines, Iowa.

To the Minneapolis, St. Paul and Sault Sainte Marie Railroad Company, Thomas Lowry, President, C. F. Clermont, Secretary, and Treasurer, and A. H. Bright, General Solicitor:

You are hereby notified, that we demand you for immediate settlement, and the payment to us of $3000.00 being the amount of our loss, occasioned by the stealing of a package of currency amounting to $3000.00 which was sent by the Metropolitan Bank of Minneapolis, Minnesota, to the German State Bank of Harvey, North Dakota, said loss being occasioned by your negligence, and the negligence of your employees, in not taking proper care thereof, and allowing same to be lost or stolen, same having been sent by Express, or registered mail, and carried over your road, and unless we receive immediate settlement for said amount, and the payment of said sum of $3000.00 we shall commence suit against you for the recovery thereof.

Dated this ..... day of February, 1901.

(Signed) A. U. QUINT,
Treasurer and Manager.

Exhibit "B."

66 State of North Dakota,
County of Wells—ss.

Know All Men by These Presents:

That we, German State Bank, hereby assign, transfer and set over unto the Bankers Mutual Casualty Company or their order, all our right, title and interest in any and all of the money contained in the package shipped by registered mail on the 10th day of November, 1900, by the Metropolitan Bank of the Town of Minneapolis, State of Minnesota, and hereby authorize the Bankers Mutual Casualty Company or their assigns to maintain action in their own name to recover any or all of said money, with the same rights and powers as we ourselves could do it.

(Signed) GERMAN STATE BANK.
By A. N. Beiseker, Cashier.

Exhibit "C."

67 And on November 12, 1901, the following stipulation was filed of record in said cause, to wit:

68 In the United States District Court, Fourth District of Minnesota.

November, A. D. 1901.

Bankers Mutual Casualty Company, a Corporation and Citizen of the State of Iowa, Substituted as Plaintiff in lieu of the German State Bank, Original Plaintiff,

vs.

The Minneapolis, Saint Paul and Sault Sainte Marie Railway Company, a corporation and Citizen of the State of Minnesota, Defendant.

Amended and Substituted Complaint.

It is hereby stipulated between the parties hereto, that the amended and substituted complaint heretofore filed herein, by the plaintiff, may be amended by inserting therein, on page five (5) thereof, after the word "official," in the fourteenth (14) line of said page five (5) the words, "between eleven and twelve o'clock p. m. of said night."

Dated November, ... 1901.

HENRY CONLIN,
Attorney for Plaintiff.
ALFRED H. BRIGHT,
Attorney for Defendant.

It is stipulated that the demurrer to the amended complaint in the above entitled action may be set down for hearing on Saturday the 23rd of November, 1901.

HENRY CONLIN,
Attorney for plff.
ALFRED H. BRIGHT,
Atty. for Deft.

69 And on December 20th, 1901. the following decision was filed of record in said cause, to wit:

70 United States Circuit Court, District of Minnesota, Fourth Division.

Bankers Mutual Casualty Company

vs.

The Minneapolis, Saint Paul and Sault Ste. Marie Ry. Co.

Decision.

This action was begun by the German State Bank of Harvey, North Dakota, against the above named defendant. After a demurrer to the original bill of complaint was sustained, the complaint was amended and the Bankers Mutual Casualty Company was by consent substituted as plaintiff; and the case is presented again upon demurrer to this complaint of the present plaintiff.

The statement of facts is the same in substance as in the original complaint. The added statement that there was no contract between the United States and the defendant for the carriage of the mails is overborne by specific particular statements of fact showing the contrary; and the new allegation that the defendant—a railway corporation—was not sworn as an official or employee of the Post Office Department, needs no comment.

The reasons for holding that this complaint does not state any cause of action against the defendant are set forth in my decision sustaining the demurrer to the original complaint, and need not be here repeated.

The demurrer is sustained. Plaintiff may have twenty days from the filing hereof to amend its complaint, if so advised, otherwise judgment is ordered for the defendant with costs.

WM. LOCHREN, Judge.

Indorsed: "Filed Dec. 20, 1901. Henry D. Lang, Clerk, by Jesse H. Smith, Deputy."

71 And on January 8, 1901, the following proceedings of court were entered of record in said cause, viz:

72 United States Circuit Court for the District of Minnesota, Fourth Division.

Term Minutes, September Term, A. D. 1901, January 8, 1902.

Wednesday morning.

Court opened pursuant to adjournment.

Present: Honorable William Lochren, Judge; Henry D. Lang, Clerk; by Geo. F. Hitchcock, Jr., Deputy.

Bankers Mutual Casualty Co.,

v.

Minneapolis, St. Paul and Sault Sainte Marie Railway Company.

It is hereby stipulated by and between the parties to the above entitled action, by their respective attorneys, that the defendant herein may tax costs against the plaintiff on the 8th day of January, 1902, at two o'clock in the sum of $15.15 and that the same may be inserted in the judgment in said action, which may then and there, at said time, be entered in favor of the defendant and against the plaintiff.

Dated January 8th, 1902.

HENRY CONLIN,
Attorney for Plaintiff.
ALFRED H. BRIGHT,
Attorney for Defendant.

Pursuant to the above stipulation the following judgment was entered herein, to wit:

Be it remembered: that on the 23rd day of November, A. D. 1901, by agreement of *parties and* under the order of this Court, this cause came on for hearing before the Hon. Wm. Lochren acting as Circuit Judge, upon the demurrer filed by defendant to plaintiff's Amended & Substituted Complaint, as amended by stipulation of the parties, the plaintiff appearing by its attorneys H. F. Dale, Geo. W. Bowen and Henry Conlin, and the defendant appearing by its attorney Alfred H. Bright and thereafter on the 20th day of December,
73 A. D. 1901, the Court being duly advised in the premises, sustained said demurrer upon the first ground thereof, to which said ruling plaintiff, at the time, duly excepted, and then and there this substituted plaintiff elected to stand upon its said Amended and Substituted complaint, as amended by stipulation, and refused to plead further.

It is thereupon ordered and adjudged by the Court, that plaintiff's said action be and is hereby dismissed on the merits and that defendant have and recover of and from the substituted plaintiff the costs of this action, taxed in the sum of Fifteen and 15/100 Dollars, and that execution issue therefor, to which said judgment the Substituted plaintiff, at the time duly excepted.

Dated January 8th, 1902.

WM. LOCHREN, Judge.

Ordered: That this Court be, and the same hereby is adjourned until Thursday, January 9, 1902, at ten o'clock a. m.

A True Record.

Attest: HENRY D. LANG, Clerk,
By George F. Hitchcock, Deputy.

74 United States of America.

Circuit Court of the United States, District of Minnesota, Fourth Division.

I, Henry D. Lang, Clerk of said Circuit Court, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Eighth Circuit, that the foregoing, consisting of 73 pages, numbered consecutively from 1 to 73 inclusive, is a true and complete transcript of the Records, Process, Pleadings, Orders, Final Judgment and all other proceedings in said cause and of the whole thereof, as appears from the original records and files of said Court; and I do

further certify and return, that I have annexed to said transcript, and included within said paging, the original citation, together with the proof of service thereof.

In Witness Whereof, I have hereunto set my hand, and affixed the seal of said Court, at Minneapolis, in the District of Minnesota, this First day of March, A. D. 1902.

Seal
U. S. Circuit Court,
Dist. of Minnesota,
Fourth Division.

HENRY D. LANG, Clerk,
By George F. Hitchcock, Jr., Deputy.

Filed Mar. 6, 1902. John D. Jordan, Clerk.

(*Appearance for Plaintiff in Error.*)

And on the eleventh day of March, A. D. 1902, an appearance of counsel for plaintiff in error was filed in the clerk's office of said circuit court of appeals in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

THE BANKERS MUTUAL CASUALTY COMPANY, Plaintiff in Error,
vs.
THE MINNEAPOLIS, ST. PAUL AND SAULT SAINTE MARIE Railway Co. } No. 1727.

The clerk will enter *my* appearance as counsel for the plaintiff in error.

HORATIO F. DALE,
GEO. W. BOWEN,
HENRY CONLIN, AND
WILLIAM CONNOR.

HORATIO F. DALE,
Des Moines, Iowa, Counsel.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. No. 1727. The Bankers Mutual Casualty Company, plaintiff in error, *vs.* The Minneapolis, St. Paul and Sault Sainte Marie R'y Co. Appearance. Filed Mar. 11, 1902, John D. Jordan, clerk. Horatio F. Dale, Geo. W. Bowen, Henry Conlin and William Connor, counsel for pl'ff in error.

(*Appearance for Defendant in Error.*)

And on the nineteenth day of March, A. D. 1902, an appearance of counsel for defendant in error was filed in the clerk's office of said circuit court of appeals in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

BANKERS MUTUAL CASUALTY CO., Plaintiff in Error,
vs.
MINNEAPOLIS, ST. PAUL AND SAULT SAINTE MARIE Railway Company. } No. 1727.

The clerk will enter my appearance as counsel for the defendant in error.

ALFRED H. BRIGHT.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. No. 1727. Bankers Mutual Casualty Co., plaintiff in error, *vs.* Minneapolis, St. Paul and Sault Sainte Marie R'y Co. Appearance. Filed Mar. 19, 1902, John D. Jordan, clerk. Alfred H. Bright, Minneapolis, Minn., counsel for def't in error.

(*Argument Commenced.*)

And on the sixteenth day of May, A. D. 1902, in the record of the proceedings of said circuit court of appeals is an entry in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1902.

FRIDAY, *May* 16, 1902.

THE BANKERS MUTUAL CASUALTY COMPANY, Plaintiff in Error,
vs.
THE MINNEAPOLIS, ST. PAUL AND SAULT SAINTE MARIE Railway Company. } No. 1727.

In error to the circuit court of the United States for the district of Minnesota.

This cause having been called for hearing in its regular order, argument was commenced by Mr. Horatio F. Dale for plaintiff in error and continued by Mr. Alfred H. Bright for defendant in error, and the hour of adjournment having arrived further argument is postponed until tomorrow morning.

(*Order of Submission.*)

And on the seventeenth day of May, A. D. 1902, in the record of the proceedings of said circuit court of appeals is an order of submission in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1902.

SATURDAY, *May* 17, 1902.

THE BANKERS MUTUAL CASUALTY COMPANY, Plaintiff in Error,
vs.
THE MINNEAPOLIS, ST. PAUL AND SAULT SAINTE MARIE Railway Company. } No. 1727.

In error to the circuit court of the United States for the district of Minnesota.

This cause coming on to be further heard, argument was continued by Mr. Alfred H. Bright for defendant in error and concluded by Mr. Horatio F. Dale for plaintiff in error.

Thereupon, this cause was submitted to the court on the transcript of record from said circuit court and the briefs of counsel filed herein.

(*Opinion.*)

And on the fourteenth day of July, A. D. 1902, an opinion of said circuit court of appeals was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, A. D. 1902.

BANKERS MUTUAL CASUALTY COMPANY, Plaintiff in Error,
vs.
THE MINNEAPOLIS, ST. PAUL AND SAULT Sainte Marie Railway Company, Defendant in Error. } No. 1727. In Error to the Circuit Court of the United States for the District of Minnesota.

Mr. H. F. Dale (Mr. William Connor, Mr. George W. Bowen and Mr. Henry Conlin were with him on the brief) for the plaintiff in error.

Mr. Alfred H. Bright for defendant in error.

Before Sanborn and Thayer, circuit judges, and Garland, district judge.

Statement.

Plaintiff in error brought an action in the court below against defendant in error, for the purpose of recovering three thousand dollars ($3,000) and interest, by reason of the facts alleged in its complaint. The complaint alleged the following facts:

"That the Bankers' Mutual Casualty Company, during all of the year A. D. 1900, and up to the present time, is and was a corporation, duly organized under the laws of the State of Iowa, and a citizen of said State, with its principal place of business at Des Moines, in said State engaged in the business of insuring banks against loss from robbery and burglary, including the insurance against loss of packages of money, while in the course of transmission from place to place, while regularly carried in the United States registered mails.

"That defendant, during all of the year A. D. 1900, and up to the present time, is and was a corporation, duly organized under the laws of the State of Minnesota, and a citizen of said State, with its principal place of business at Minneapolis, in said State, engaged in operating a line of railroad situated in the States of Minnesota and North Dakota.

"That the German State bank, during all of the year A. D. 1900, and up to the present time, is and was a corporation, duly organized under the laws of the State of North Dakota, and a citizen of said State, with its principal place of business at the town of Harvey, in said State, engaged in a general banking business at said town.

"That during the whole year A. D. 1900, and up to the present time, defendant is and was engaged in carrying the United States mails between the terminal and intermediate stations located upon and along its said line of railroad, under and by virtue of the statutes and laws of the United States, and the regulations established by the Postoffice Department of the United States Government and in pursuance of a fixing of the compensation to be paid to defendant by the United States Government for carrying said mails and the person in charge thereof, based upon the last preceding reweighing of said mails and upon notice in writing, in the usual form, from the Second Assistant Postmaster General of the United States, requiring defendant to carry said mails and the person in charge thereof.

"That said depot, at or near the town of Harvey, was an intermediate station on that part of defendant's said line of railroad within the State of North Dakota, which extends from the station at Hankinson to the station at Portal, and the railroad line between said stations at Hankinson and Portal is designated by and known to the Postoffice Department of the United States, as railroad route No. 161,018, being a distance of 344.58 miles, and the compensation fixed by the United States Postoffice Department to be paid annually by the United States to defendant, during all the period herein referred to for the carriage of said mails and the person in charge thereof is and was the sum of sixty-four thousand eight hundred and fifteen and 49-100 dollars ($64,815.49) at the rate of $188.10 per mile.

"That this substituted plaintiff is not in possession of the aforesaid notice to defendant, and is unable to attach to this petition said notice or a true copy thereof.

"That during all of the period hereinbefore referred to, there was no contract of any kind between defendant and the United States

Government, concerning or providing for the carriage by defendant, of said mails, or any part thereof, or of the person in charge of said mails, upon or along defendant's said line of railway or any part thereof.

"That on or about the 10th day of November, A. D. 1900, the Metropolitan bank, a corporation organized under the laws of the State of Minnesota, was engaged in transacting a general banking business in the city of Minneapolis, in said State, and on or about said date, said bank deposited in the United States mails, at Minneapolis, in said State, a package containing lawful money of the United States, commonly known and called currency, of the actual cash value of three thousand dollars ($3,000.00), in an envelope properly addressed to the German State bank, at Harvey, North Dakota, and prepaid thereon the postage and registration fee, and said package was thereupon duly registered by the postmaster at said postoffice. That from and after the time of depositing said package in said post-office at Minneapolis, said package and its contents *was* the property of said German State bank.

"That said registered package was covered by insurance and indemnity against loss while in transit through the United States mails from Minneapolis to said Harvey, under a policy of insurance issued by said Bankers Mutual Casualty Company, the substituted plaintiff, said insurance being for the use and benefit of said German State bank. That a true copy of said policy is hereto attached as part hereof, and marked Exhibit 'A.'

"That on or about November 10th, A. D. 1900, and while said package was in good safety and prior to the departure of the train carrying said registered package, said Metropolitan bank deposited in the United States mails, at the postoffice in said city of Minneapolis, a letter of advice, properly addressed to said Bankers Mutual Casualty Company at Des Moines, Iowa, with postage thereon prepaid, that said letter of advice notified said Bankers Mutual Casualty Company, of the shipment by said Metropolitan bank of said sum of three thousand dollars to said German State Bank of Harvey, and upon said mailing of said letter of advice, the contract of insurance and indemnity of said registered package of currency immediately attached thereto and became a valid and complete contract of insurance and indemnity by the said Bankers Mutual Casualty Company, in favor of said German State bank.

"That in the regular course of transmission of the United States mails between the said city of Minneapolis and the said town of Harvey, said registered package was duly delivered by the postoffice officials of said city of Minneapolis to the railway mail clerk or other proper postal official, and placed in a railway mail car or other proper car, the property of defendant, then standing upon defendant's said line of railway, and was transported by defendant railway company to defendant's railway depot or station, situated in or near said town of Harvey, North Dakota.

"That prior to the arrival of said registered package at said town of Harvey, the same, together with other registered mail packages

and other mail matter, was, by said railway mail clerk in charge of said mails, duly enclosed in a regular United States mail-sack or mail-pouch, which said mail-sack or mail-pouch was securely locked or fastened by the official Government strap and lock.

"That from and after the time of the depositing of the mail sack containing said currency in defendant's mail-car at Minneapolis, Minnesota, for the purpose of transit and transportation for delivery at Harvey, North Dakota, the same was under the exclusive care, custody and control of the postal clerks, regularly employed by the United States Government and in charge of the mail in said car; that the mail sacks containing said registered package, from and after the time of its delivery in said postal car, to the proper postal clerks therein, up to and including the delivery of said mail-sack at Harvey, North Dakota, was in the exclusive care, custody and control of the said postal clerks or authorities.

"That upon the arrival of defendant's said train and postal car at said town of Harvey, North Dakota, said railway mail clerk or other postal official, between eleven and twelve o'clock of said night, delivered said mail-sack, duly locked, together with said registered package of currency therein contained to one James Magson, the night station agent, or night operator of defendant at said town of Harvey, that said night station agent, or night operator, was not sworn as an official or employee of the Postoffice Department of the United States Government, as required by law, but was then and there employed and duly authorized by the defendant to receive and take charge of all mail matter received over defendant's said line of railway, at said town of Harvey, including the mail-sack or mail-pouch containing said package of currency, and to deposit same in defendant's depot, at Harvey, North Dakota, and did so receive, take charge of and deposit said mail-sack or mail-pouch.

"That defendant was not sworn as an official or employee of the Postoffice Department of the United States Government, and had not subscribed or sworn to any oath relating to or concerning the carriage of the United States mails, or the performance of defendant's duties as such carrier of the mails.

"That section 713 of the postal laws and regulations of the United States of the year A. D. 1893, which was in force at the time of the receipt and transmission of said registered postage is in words and figures as follows, to-wit: 'The railroad company will also be required to take the mails from and deliver them into all intermediate postoffices and postal stations located not more than 80 rods from the nearest railroad station at which the company has an agent or other representative employed.'

"That said postoffice at Harvey was an intermediate postoffice and was located not more than 80 rods from defendant's railroad station, or depot, at, or near said town of Harvey.

"That under said postal regulation it was the duty of said defendant to provide a sufficient and safe receptacle or place for the safety and security of said mail, while in its said custody, also to safely care for and guard said mail-sack and its contents during the

night, also to safely deliver the same to the postmaster or postmistress at the postoffice in said town of Harvey, North Dakota.

"But neglecting its said duty in the premises, defendant wholly failed and neglected to provide any receptacle or place for the safe or secure keeping of mail, and also failed to place a duly sworn official in charge of said mail-sack and further wholly failed to safely care for or guard said mail-sack and its contents, and also wholly failed to safely deliver the same, at the postoffice to the postmaster in said town of Harvey. That by reason of defendant's said negligence, some person, to this plaintiff unknown, in some manner not known to this plaintiff, obtained access to said mail-sack and opened the same and abstracted or took therefrom said registered package whereby the same was wholly lost to said German State bank.

"That one, George A. Soule, was then the roadmaster or foreman employed by said defendant at said town of Harvey, or one of defendant's employees or servants, but was not sworn in as an official or employee of the Postoffice Department, as required by law, and was not authorized or employed by defendant to take charge of said mail-sack or to perform any duty in relation thereto and had no right of access to said mail-sack, or to the mail therein contained, by virtue of his said employment by defendant.

"That said Soule had previously unlawfully obtained and caused to be made a key to the United States Government mail-sacks or mail-pouches, and personally, or with the aid and assistance of some person or persons, to this plaintiff unknown, did enter one of the rooms contained in the said depot building, where said mail-sack or mail-pouch had been placed by defendant's operator or night agent, on the floor or wall of said room, and not in any separate room, closet or other safe receptacle, capable of being securely fastened against any intruder or unauthorized person, by lock and key or otherwise. That said room was not designed for or capable of safely keeping valuable articles or property.

"That said Soule, or other person, had no right of access to said room, or to said mail-sack or mail-pouch, but through the negligence of defendant and its said night operator or night agent as set forth in this complaint, did gain entrance to said room and obtain access to said mail-sack or mail-pouch, and the mail matter therein contained, and did find said mail-sack or mail-pouch situated or placed as above set forth, so that the same was readily accessible to any person gaining entrance to said room, and did find said mail-sack or mail-pouch wholly unprotected and unguarded by said night operator or otherwise.

"That said Soule, or other person, by reason of the aforesaid negligence of said defendant and its said night agent or night operator, did obtain access to said mail-sack or mail-pouch and did unlock the same and abstract and take therefrom the aforesaid registered package, containing said three thousand dollars ($3,000.00) in currency and did unlawfully convert the same to his use and benefit, and the same has never been delivered or returned to said German State

bank or to said Metropolitan Bank of Minneapolis, or to this plaintiff, The Bankers Mutual Casualty Company, or to any one for the benefit of any of them.

"That in consequence of the loss of said package, as hereinabove stated, said Bankers Mutual Casualty Company, substituted plaintiff, became indebted to said German State Bank of Harvey under its said policy of insurance, and was compelled to and did pay said German State bank the full amount of the loss so sustained by it, to-wit: the sum of three thousand dollars ($3,000.00) in good and lawful money of the United States; the same being the amount of insurance or indemnity held by said German State bank, and covered by said policy of insurance. That written demand has been made by said German State bank and said Bankers Mutual Casualty Company of and from defendant, for repayment to them or one of them of said sum of three thousand dollars, a copy of which written demand is hereto attached, as part hereof, and marked Exhibit 'B,' which payment defendant has refused and still refuses to make.

"That by reason of the foregoing facts, the said Bankers Mutual Casualty Company has been and is now subrogated to all rights and remedies, which said German State Bank of Harvey had against defendant, to recover the sum of three thousand dollars, so lost, with interest on said sum from and after the 10th day of November, A. D. 1900.

"That for the purpose of further effectuating the rights of subrogation of this substituted plaintiff, against defendant, and to enable it to recover from defendant the sum so lost, said German State bank, in writing, transferred and assigned to the plaintiff all of its rights in and to said money lost, and to sue for the recovery thereof. A true copy of said instrument of assignment is hereto attached, as part hereof, and marked 'Exhibit C.'"

Defendant in error demurred to said complaint, upon the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained by the court and the plaintiff in error having elected to stand upon its complaint, the action was dismissed on the merits. The order sustaining the demurrer was duly excepted to, and this ruling of the court is assigned as error.

CARLAND, district judge, after stating the case as above, delivered the opinion of the court.

This case presents but one question for our consideration, and that is whether or not the defendant in error is liable to the plaintiff in error, upon the facts stated?

No Federal decision is called to our attention, and we are unable to find any, parallel to the case at bar. There are, however, well settled principles of law which we believe must determine the case. It is claimed by plaintiff in error that it is alleged in the complaint and admitted by the demurrer, that defendant in error had no contract relation with the United States in pursuance of which it carried the mail between Minneapolis, Minnesota, and Harvey, North Dakota. That the duty to carry the mail safely was imposed

upon defendant in error by the Constitution and laws of the United States, and that this duty being imposed by law any person injured by a violation thereof would have his remedy. If we correctly understand counsel, it is argued that there was no contract relation between the defendant in error and the United States, in order to avoid the objection that plaintiff in error stands in no such relation to that contract as would enable it to maintain an action for a breach thereof. In the view we take of the case, however, we do not see how it makes any difference whether defendant in error was carrying the mail under and by virtue of a contract with the United States, or whether that duty was imposed by the Constitution and laws thereof; in either event it was a public agent of the United States and its liability must be determined accordingly. The defendant in error, in regard to its liability for the loss of the money, was in no sense a common carrier. As was said in the case of *Central Railroad and Banking Company v. Lampley*, 76 Alabama 357: "Between a contractor for carrying the public mails and the sender of letters, there is no privity of contract, and the contractor has no right to and receives no remuneration from the sender. The Government undertakes the transmission of the mails, and receives pay therefor by the postage charged. The contractor's contract is with the Government, and by it his compensation is paid. He owes a duty, not to the sender of the letters as an individual, but to the integral public, springing from his agreement to carry the mails. The public mail is not the proper subject of a common carrier's charge, and the extraordinary responsibility attached by law to such employment does not attach to a mail-contractor. He does not become an insurer of the safe transportation of mail matter; the extent of his liability is the same as that of a bailee for hire.

The railroad company was not transformed into a common carrier as to the mails, because, being engaged in the regular business of transporting goods for the public, it was, at the same time, carrying the mails by direction and employment of the proper department of the Government. The occupation of the company was of a dual character. It was acting in two capacities, created and regulated by separate and distinct contracts and employments. The liability of the defendant cannot, therefore, be determined by the rules governing the responsibility of a common carrier."

It seems clear to us that defendant in error was a public agent of the United States, in relation to carrying the mail, for the reason that the Constitution of the United States conferred upon them the power to establish post offices and post roads, and this power was granted by the people as one of the sovereign powers to be exercised by the General Government, exclusively. By virtue of this grant of power the United States has always through its Post Office Department assumed the exclusive charge of the carriage and delivery of the mail for the benefit of all the people. In doing so, the United States are beyond question engaged in the discharge of a governmental function. All persons or corporations who are engaged in the carriage or delivery of the mail, by the authority of the United

States, conferred by contract or general laws, are but the instruments used by them to discharge this function. As a practical illustration as to whether the defendant in error was engaged in the discharge of a governmental function, let us suppose that some person had attempted to obstruct the carriage and delivery of this mail sack, which contained the money in controversy, at the post office at Harvey, N. D., while it was in possession of defendant in error. Would not the person be liable to punishment under the penal laws of the United States? Beyond question he would. From whence springs the power of the United States to punish such an act? It springs from the authority that all governments possess of punishing the person who obstructs that government in the lawful discharge of its duty.

It now becomes necessary to ascertain what the liabilities of public agents are, and upon this question there seems to be little, if any, conflict of authority. A public officer or agent, provided he has exercised ordinary care to select competent subordinates, is not responsible for the misfeasances or positive wrongs, or for the non-feasances, or negligences or omissions of duty of the sub-agents or servants, or other persons properly employed by or under him in the discharge of his official duties. *Robertson v. Sichel*, 127 U. S. 507, Story on Agency, sec. 319.

In reference to the Post Office Department, it has been uniformly held, that the Postmaster General, the deputy postmasters and their assistants and clerks, appointed and sworn as required by law, are public officers, each of whom is responsible for his own negligence only, and not for that of any of the others, although selected by him and subject to his orders. *Lane v. Cotton*, 1 Ld. Raym. 646; *Whitfield v. Le Despencer*, Cowp. 754; *Dunlop v. Monroe*, 7 Cranch 242; *Schroyer v. Lynch*, 8 Watts 453; *Bishop v. Williamson*, 11 Me. 495; *Hutchins v. Brackett*, 22 N. H. 252; *Conwell v. Voorhees*, 13 Ohio 523; Story, Bail. sec. 462–463; *Robertson v. Sichel*, 127 U. S. 507.

The same doctrine has been extended or applied to mail contractors by the cases of *Conwell v. Voorhees*, 13 Ohio 523; *Hutchins v. Brackett*, 22 N. H. 252; *Foster v. Metts*, 55 Miss. 77.

The court, however, refused to extend the rule to mail contractors in the cases of *Central Railroad & Banking Co. v. Lampley*, 76 Alabama 357; *Sawyers v. Corse*, 17 Gratt. 230.

The Alabama court adopted and followed the reasoning of the Virginia court. The reasoning of the cases cited, is illustrated by the following language taken from the opinion in *Central Railroad and Banking Company v. Lampley:*

"The contractor, being the person who contracts with and is paid by the Government, and who gives a guarantee for the faithful discharge of the service, is the public agent, if such contract constitutes an agency. He is the one directly responsible to, and with whom the Government deals. He employs his own carriers, who are paid by him, and who are not known to the Government, other than as his employees. As to civil responsibility, the contractor stands between the carrier and the Government; although, for the purpose of public

security, an oath may be required of the carrier, and penalties imposed for violations of the laws of the postal service. In a sense, the carrier may be said to do work for the Government, not as an agent, but as one employed by the contractor, in his own name, for his individual benefit, and on his personal responsibility, as necessary help to do the service which he has contracted to do. Laborers employed by a contractor for the construction of naval vessels, or for the erection of public buildings, may, in the same sense, be said to do work for the Government, but they are not public laborers. We approve and adopt the legal propositions, as to the liability of a contractor, maintained and asserted in *Sawyers v. Corse*, 17 Grat., 230."

This reasoning would make the defendant in error a public agent, but would deny that position to the agent at Harvey, the subordinate agent of the defendant in error being what is called a carrier in the opinion under consideration. We do not think that the comparison between a laborer employed by a contractor for the construction of naval vessels or for the erection of public buildings an apt one. The United States, in building a public building or in constructing a naval vessel through a contractor, are not exercising sovereign power or engaged in a purely governmental function. They are acting in their purely private or business capacity. Any one possessed of sufficient means may construct a vessel or build a building. The United States only can carry the mail. Hence we believe that the character of the service in which the agent is engaged must determine in the case at bar as to whether the subordinate agents of the defendant in error in so far as they were engaged in carrying the mail, were or were not public agents. Let us now apply the principles of law which in our opinion are controlling, to the facts in this case. There is nothing alleged in the complaint that would connect the defendant in error personally with the wrong complained of. That is, there is no allegation that any officer of the defendant in error whose act or omission the court would be bound to hold was the act or omission of defendant in error, did any act or omitted to do any act which caused the loss of the mail. There is no allegation that defendant in error did not exercise ordinary care in the selection of competent persons to handle the mail after it reached Harvey. The allegation of the complaint in regard to the agent at Harvey is as follows:

"That upon the arrival of defendant's said train and postal-car at said town of Harvey, North Dakota, said railway mail-clerk or other postal official, between eleven and twelve o'clock of said night, delivered said mail sack, duly locked, together with said registered package of currency therein contained to one James Magson, the night station agent, or night operator of defendant at said town of Harvey, that said night station agent, or night operator, was not sworn as an official or employee of the Post Office Department of the United States Government, as required by law, but was then and there employed and duly authorized by the defendant to receive and take charge of all mail matter received over defendant's said line of railway, at said town of Harvey, including the mail-sack or mail-pouch

containing said package of currency, and to deposit same in defendant's depot, at Harvey, North Dakota, and did so receive, take charge of and deposit said mail-sack or mail-pouch."

The fact that Magson was not sworn, is not controlling, for if the defendant in error in its business in carrying the mail, was a public agent, then it was responsible for its own negligence only and not for the negligence of its servants engaged in the same business. If the defendant in error was a person, this case would be plain. The apparent difficulty arises from separating the negligence of defendant in error from the negligence of its subordinate agent, arising from the fact that a corporation must perform all its acts through agents. We think, however, that there is a well defined distinction with reference to its duties as a carrier of the mail. To illustrate. Supposing the agent Magson had left the mail-sack on the depot platform and by reason thereof the same had been stolen. This, in the absence of any showing that defendant in error had not used proper care in the selection of Magson as its agent, would have been the negligence of Magson, for which he would have been liable, but it would not have been the negligence of defendant in error. If, however, some officer of defendant in error, who stood in such a relation to the company that his negligence would be its negligence, should negligently do some act whereby a loss occurred from the mail, then defendant in error would be liable. Let us now examine the acts of negligence alleged. Sec. 713 of the postal regulations of 1893 set out in the complaint determined the duty of defendant in error in relation to the mail-sack after its receipt by Magson. The regulation is as follows: "The railroad company will also be required to take the mails from and deliver them into all intermediate post offices and postal stations located not more than 80 rods from the nearest railroad station at which the company has an agent or other representative employed."

Whatever duty this regulation imposed upon defendant in error must be determined from the regulation itself. The demurrer admits the existence of the regulation, not the pleader's opinion or legal conclusion of its effect. It simply made it the duty of defendant in error to deliver the mail-sack at the post office. There is no allegation that the mail-sack was not delivered at the post office, but that after it was delivered to Magson, some person unknown to the pleader, opened the mail-sack and abstracted the package of money in controversy. We know nothing about the facts connected with the loss of the money except what is alleged in the complaint, and in the discussion of the case, we of course disclaim any intention of reflecting on the character of any one. The allegations of the complaint are entirely consistent with the theory that Magson stole the money. If so, in the absence of any allegation of negligence of defendant in error in employing him, there is no evidence of negligence that would charge the defendant in error, as all the precautions that it is alleged would have prevented the theft, would not have prevailed against Magson, for by the act of the postal clerk and defendant in error, the custody of the mail-sack was delivered to him. Mere proof that the package of money was stolen, no matter by whom, creates no liability

against defendant in error, unless his own negligence was the direct cause of the larceny, as contradistinguished from the negligence of its agent at Harvey. We are not informed by the record as to what was done with the mail-sack after Magson deposited the same in defendant in error's depot, or what became of it afterwards. We are satisfied, however, that if the negligence of any one directly contributed to the larceny, it was the negligence of Magson, for whose negligence in the matter of carrying the mail, the defendant in error is not liable.

The judgment below must be affirmed, and it is so ordered.

Filed July 14, 1902.

(*Judgment.*)

And on the fourteenth day of July, A. D. 1902, in the record of the proceedings of said circuit court of appeals is a judgment in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1902.

MONDAY, *July* 14, 1902.

THE BANKERS MUTUAL CASUALTY COMPANY, Plaintiff in Error,
vs.
THE MINNEAPOLIS, ST. PAUL AND SAULT SAINTE MARIE Railway Company. } No. 1727.

In error to the circuit court of the United States for the district of Minnesota.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Minnesota, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said circuit court, in this cause, be, and the same is hereby, affirmed with costs; and that The Minneapolis, St. Paul and Sault Sainte Marie Railway Company have and recover against The Bankers Mutual Casualty Company, the sum of twenty dollars for its costs herein and have execution therefor.

July 14, 1902.

(*Petition for Writ of Error.*)

And on the twenty-seventh day of September, A. D. 1902, a petition for writ of error was filed in the clerk's office of said circuit court of appeals in said cause, in the words and figures following, to-wit:

In the Supreme Court of the United States.

BANKERS MUTUAL CASUALTY COMPANY, Petitioner,
vs.
THE MINNEAPOLIS, ST. PAUL & SAULT SAINTE MARIE RAILWAY COMPANY, Respondent.
} Petition for Writ of Error.

Now comes The Bankers Mutual Casualty Company, petitioner, herein, who was plaintiff in the circuit court of the United States for the district of Minnesota, and the plaintiff in error in the circuit court of appeals for the eighth judicial circuit, and respectfully shows:

That heretofore, on the 8th day of January, A. D. 1902, upon a demurrer filed by said railway company as defendant in said circuit court, a final judgment was rendered and entered of record against this petitioner sustaining said demurrer and dismissing the complaint of this petitioner on the merits, and for costs, said proceeding being had and said judgment rendered in an action at law commenced in said circuit court, in which action this petitioner, a corporation organized under the laws of the State of Iowa, was plaintiff and the said The Minneapolis, St. Paul & Sault Sainte Marie Railway Company, a corporation organized under the laws of the State of Minnesota, was defendant.

Said judgment against your petitioner was rendered in an action brought by it against the said railway company to recover the sum of three thousand dollars ($3,000.00) damages caused by the loss of three thousand dollars ($3,000.00) in currency of the United States, which was being transmitted in November, A. D. 1900, in and by means of the United States registered mail from the city of Minneapolis in the State of Minnesota to the town of Harvey in the State of North Dakota, the United States mail bag containing said registered package being carried by said railway company between the points mentioned, under notification from and by direction of the Post-office Department of the United States, and in accordance with the laws of the United States and the duly established rules and regulations of the Post-office Department, said registered package having been lost through the alleged negligence of said defendant railway company and its employé, at defendant's depot at said Harvey in North Dakota, while said registered package was in the exclusive care and custody of defendant by its said employé; and your petitioner avers that said action arose under and involved the construction and application of the laws of the United States and of the rules and regulations duly established by the Postmaster General under and by virtue of the statutes of the United States.

That upon said adverse decision by said circuit court, your petitioner sued out a writ of error from said circuit court of appeals, wherein such proceedings were had that a judgment of affirmance

was rendered on the 14th day of July, A. D. 1902, and such judgment, as your petitioner is advised, was unwarranted in law.

Petitioner therefore prays that a writ of error be allowed so as to have a review in the Supreme Court of the United States of said decision of said circuit court of appeals, presenting herewith a bond in proper form, an assignment of errors, a certified copy of the opinion of said circuit court of appeals and a certified copy of the record upon which said cause was submitted in said court.

HORATIO F. DALE,
WILLIAM CONNOR,
A. U. QUINT,
Attorneys for Petitioner.

HORATIO F. DALE, *Of Counsel.*

Writ of error allowed this — day of September, A. D. 1902.

____ ____,
Associate Justice, Supreme Court United States.

(Endorsed:) Supreme Court United States. Bankers Mut. Casualty Co., *vs.* The Minneapolis, St. Paul & Sault Sainte Marie R'y Co. Petition for writ of error. Filed Sep. 27, 1902, John D. Jordan, clerk.

(*Assignment of Errors.*)

And on the twenty-seventh day of September, A. D. 1902, an assignment of errors was filed in the clerk's office of said circuit court of appeals in said cause, in the words and figures following, to-wit:

In the Supreme Court of the United States.

BANKERS MUTUAL CASUALTY COMPANY, Plaintiff in Error,
vs.
THE MINNEAPOLIS, ST. PAUL & SAULT Sainte Marie Railway Company, Defendant in Error.
} Assignments of Error.

Comes now plaintiff in error, Bankers Mutual Casualty Company of Des Moines, Iowa, and alleges that in the United States circuit court for the district of Minnesota, defendant railway company filed a demurrer to the complaint of said Bankers Mutual Casualty Company, which demurrer was sustained by said circuit court, and said plaintiff refusing to plead further a judgment on the merits was rendered dismissing the complaint of said Bankers Mutual Casualty Company and for costs. That thereafter the United States circuit court of appeals for the eighth circuit affirmed the judgment of said circuit court and adjudged that plaintiff in error should pay all

costs. Plaintiff in error further alleges that said several judgments are erroneous and against the rights of plaintiff in error, and that there is manifest error upon the face of the record in said judgment of the circuit court of appeals for the following reasons:

First. Conceding that defendant in error was a public agent (other than a public officer) carrying the United States mail, as held by said circuit court of appeals, the court erred in holding that defendant in error was entitled to exemption from liability for the loss of a registered letter while in the lawful custody of James Magson, the night operator of defendant in error, which loss was occasioned by the negligence, default or misfeasance of said employé; and further erred in holding that defendant in error was entitled to the same exemption from liability for the negligence, default or misfeasance of its employé, as a public officer of the United States would have had in respect to his subordinate officer engaged in the public service.

Second. The court erred in holding that defendant in error was a public officer of the United States, in that defendant in error was not a superior public officer appointed by the President by and with the advice and consent of the Senate, nor was it an inferior public officer appointed by the President, or by the head of a department, or by a court of law, and erred in adjudging that defendant in error had the same exemption from liability for the default, negligence or misfeasance of its employé which a principal public officer was entitled to, under the decision of this court made in the case of Robertson *vs.* Sichel in 127 U. S. 507.

Third. The court erred in holding that defendant in error was a public agent of the United States in this:

(*a.*) Defendant in error was not exclusively engaged in the performance of any Government function, but was a private corporation for pecuniary profit, organized under the laws of the State of Minnesota as a common carrier of persons and property, and was primarily engaged in such business, the carriage of the United States mail by it being merely incidental to its said ordinary business, and undertaken by it for the purpose of enhancing its revenue and profits.

(*b.*) As a corporation, defendant in error could act only by and through its agents and could not personally perform the duties of employing proper persons as subordinates, of properly supervising such subordinates, of discharging subordinates found to be incompetent persons, and of furnishing proper appliances for the conduct of said business, all of which are required to be done and performed personally by a natural person acting as a public officer.

(*c.*) Defendant in error was not and could not be sworn into the postal service of the United States.

Fourth. The court erred in holding that said James Magson, the night operator of defendant in error, was a subordinate public officer or agent of the United States in this:

(*a.*) Said Magson was an ordinary employé of defendant in error, employed and discharged at the will of defendant in error, and not

subject to discharge by any official of the United States; said Magson was paid from the ordinary revenues of defendant in error, and was mainly engaged in the performance of services for defendant in error as a common carrier, being engaged only incidentally in handling and caring for the United States mail at Harvey, North Dakota.

(*b.*) Said Magson was not sworn into the postal service of the United States.

Fifth. The court erred in its construction and application of postal regulation No. 713 set out in the complaint, and of the statutes of the United States relating to the carriage of the United States mail, in this:

(*a.*) The court refused to hold that defendant in error, considered as a principal public agent, was guilty of negligence in failing to furnish a suitable and safe place for the keeping of mail in its exclusive custody at its depot at Harvey, North Dakota, and in failing to place in charge of such mail a vigilant employé duly sworn into the postal service of the United States, and in each of said failures.

(*b.*) The court refused to hold that the abstraction of the registered letter in question from said mail pouch while in the exclusive custody of defendant in error in its depot at Harvey, North Dakota, under the circumstances stated in the complaint, did constitute negligence on the part of defendant in error, or of said night operator, Magson, or of both of them.

Sixth. The court erred in holding that under the allegations of the complaint said night operator, Magson, might have stolen said registered letter; and further erred in holding that in case said Magson did steal said registered letter defendant in error was not liable for the loss thereby caused to plaintiff in error.

Seventh. Plaintiff in error further assigned as errors each and all of the errors assigned in the circuit court of appeals on the hearing of this case before that court, and each and all of the same are hereby referred to and made a part of this assignment of errors as if herein fully set out.

Wherefore plaintiff in error prays that said order and final judgment of said circuit court of appeals and of said circuit court be reversed, with all costs of this suit.

September 11th, A. D. 1902.

HORATIO F. DALE,
WILLIAM CONNOR,
A. U. QUINT,
Attorneys for Plaintiff in Error and Petitioner.

H. F. DALE,
Des Moines, Iowa, of Counsel for Petitioner.

(Endorsed:) U. S. Supreme Court. Bankers Mutual Casualty Co. vs. The Minneapolis, St. Paul & Sault Sainte Marie R'y Co. Assignments of error. Filed Sep. 27, 1902, John D. Jordan, clerk.

(*Bond on Writ of Error.*)

And on the twenty-seventh day of September, A. D. 1902, a bond on writ of error was filed in the clerk's office of said circuit court of appeals in said cause, in the words and figures following, to-wit:

Know all men by these presents, that we, Bankers Mutual Casualty Company of Des Moines, Iowa, as principal, and the United States Fidelity & Guaranty Company of Baltimore, Md., as surety, are held and firmly bound unto the Minneapolis, Saint P. & Sault Sainte Marie Railway Company of Minneapolis, Minnesota, in the full and just sum of five hundred ($500.) dollars, to be paid to the said The Minneapolis, Saint Paul, — Sault Sainte Marie Railway Company, its certain attorney, representatives or assigns: to which payment well and truly to be made, we bind ourselves, our successors and representatives, jointly and severally by these presents.

Sealed with our seals, and dated this eleventh day of September in the year of our Lord one thousand nine hundred and *ninety* two (1902).

Whereas, lately at the May term, A. D. 1902, of the circuit court of appeals of the United States for the eighth judicial circuit on the 14th day of July, in a suit depending in said court between Bankers Mutual Casualty Company, plaintiff in error, and The Minneapolis, Saint Paul and Sault Sainte Marie Railway Company, defendant in error, a final judgment was rendered against the said Bankers Mutual Casualty Company and the said Bankers Mutual Casualty Company having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said The Minneapolis, Saint Paul and Sault Sainte Marie Railway Company, citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within thirty days from and after the date of said citation.

Now the condition of the above obligation is such, that if the said Bankers Mutual Casualty Company shall prosecute said writ of error to effect, and answer all damages and costs if it fail to make good its plea, then the above obligation to be void, else to remain in full force and virtue.

BANKERS MUTUAL CASUALTY CO.,
By A. U. QUINT, *Treas.* [SEAL.]
THE UNITED STATES FIDELITY AND GUARANTY CO.,
By PORTERFIELD K. WITMER, [SEAL.]
General Agent.

Sealed and delivered in presence of
By J. D. WALLINGFORD,
Att'y in Fact.

Approved by
DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

U. S. Circuit Court, So. Dist. of Iowa.

I hereby certify that the surety on the within bond and the bond would be approved by me if same were presented for my approval.

Witness my hand and seal of said court at Des Moines, Sept. 11, 1902.

[SEAL.]

EDWARD R. MASON,
Clerk U. S. Circuit Court, So. Dist. Iowa.

(Endorsed:) United States Supreme Court. Bankers Mutual Casualty Company, plaintiff in error, *vs.* The Minneapolis, Saint Paul and Sault Sainte Marie Railway Co., defendant in error. Bond on writ of error. Filed Sep. 27, 1902, John D. Jordan, clerk.

(*Writ of Error.*)

And on the twenty-seventh day of September, A. D. 1902, a writ of error was filed in the clerk's office of said circuit court of appeals in said cause, the original of which, with the return thereon, is hereto attached and herewith returned.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the United States circuit court of appeals for the eighth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court of appeals before you, or some of you, between Bankers Mutual Casualty Company, of Des Moines, Iowa, plaintiff in error, and The Minneapolis, Saint Paul and Sault Sainte Marie Railway Company, of Minneapolis, Minnesota, defendant in error, a manifest error hath happened, to the great damage of the said Bankers Mutual Casualty Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Seal of the Supreme Court of the United States.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 18th day of September, in the year of our Lord one thousand nine hundred and two.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] United States Supreme Court. Bankers Mutual Casualty Company *vs.* The Minneapolis, St. Paul and Sault Sainte Marie Railway Company. Writ of error. Rec'd Sept. 22, 1902. Filed Sep. 27 1902 John D. Jordan, clerk.

Return to Writ.

UNITED STATES OF AMERICA, *Eighth Circuit,* } ss:

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereto subscribe my name and affix the seal of the United States circuit court of appeals for the eighth circuit, at office in the city of St. Louis, Missouri, this sixth day of October, A. D. 1902.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

(*Citation.*)

And on the third day of October, A. D. 1902, a citation was filed in the clerk's office of said circuit court of appeals in said cause, the original of which with the admission of service endorsed thereon is hereto attached and herewith returned:

UNITED STATES OF AMERICA, ss:

To the Minneapolis, Saint Paul and Sault Sainte Marie Railway Company of Minneapolis, Minnesota, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the

clerk's office of the United States circuit court of appeals for the eighth circuit wherein Bankers Mutual Casualty Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable David J. Brewer, associate justice of the Supreme Court of the United States, this 18th day of September, in the year of our Lord one thousand nine hundred and two.

DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

[Endorsed :] 1727 United States Supreme Court. Bankers Mutual Casualty Company *vs.* The Minneapolis, St. Paul & Sault Sainte Marie Railway Co. Citation. Service admitted this 30th day of Sept. 1902 Alfred H. Bright defendant's attorney Filed Oct. 3—1902 John D. Jordan, clerk.

(*Clerk's Certificate.*)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing seventy-three pages contain full, true and complete copies of all the pleadings, proceedings and record entries, including the opinion of said circuit court of appeals, in a certain cause wherein The Bankers Mutual Casualty Company was plaintiff in error, and The Minneapolis, St. Paul and Sault Sainte Marie Railway Company was defendant in error, No. 1727, May term, 1902, as full, true and complete as the same remain on file and of record in my office.

I do further certify that the original writ of error with my return thereto and the original citation with the admission of service endorsed thereon are hereto attached and herewith returned.

In testimony whereof, I hereunto subscribe my name and affix the seal of said circuit court of appeals, at the city of St. Louis, Missouri, in the eighth circuit, this sixth day of October, A. D. 1902.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Endorsed on cover: File No. 18,687. U. S. C. C. of appeals, 8th circuit. Term No. 141. Bankers Mutual Casualty Company, plaintiff in error, *vs.* The Minneapolis, St. Paul and Sault Sainte Marie Railway Company. Filed October 13th, 1902.

FILE COPY.

FILED
NOV 27 1903
JAMES H. McKENNEY,
Clerk

141

UNITED STATES SUPREME COURT.

OCTOBER TERM, A. D. 1902.

BANKERS MUTUAL CASUALTY COMPANY,
PLAINTIFF IN ERROR

vs.

THE MINNEAPOLIS, ST. PAUL AND SAULT SAINTE MARIE RAILWAY COMPANY, DEFENDANT IN ERROR.

In Error in the United States Circuit Court for the Eighth Circuit.

BRIEF FOR PLAINTIFF IN ERROR.

HORATIO F. DALE, WILLIAM CONNOR, A. U. QUINT and G. W. BOWEN, Counsel for Plaintiff in Error.

ALFRED H. BRIGHT, Counsel for Defendant in Error.

12464

UNITED STATES SUPREME COURT.

OCTOBER TERM, A. D. 1902.

BANKERS MUTUAL CASUALTY COMPANY,
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In Error in the United States Circuit Court for the Eighth Circuit.

BRIEF FOR PLAINTIFF IN ERROR.

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ALFRED H. BRIGHT, Counsel for Defendant in Error.

ARRANGEMENT OF BRIEF OF PLAINTIFF IN ERROR.

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We hereby certify that the cost of printing this argument is $101.00 and has been paid by the Plaintiff in error the Bankers Mutual Casualty Company.

A. U. Quint.

BRIEF OF PLAINTIFF IN ERROR.

DIVISION I.

STATEMENT OF THE CASE.

The ultimate facts disclosed by the record are that a duly registered letter containing three thousand dollars was carried along the line of railroad belonging to defendant in error from Minneapolis, Minnesota, to Harvey, North Dakota, an intermediate station distant less than 80 rods from a postoffice; and said registered letter, contained in a locked mail sack, about eleven o'clock at night was there delivered to one Magson, the night station agent of defendant in error and the proper employe of defendant to receive same, whose duty it was to care for the said mail during the night and deliver same into the postoffice the following morning. That thereafter and during said night said mail sack and its contents were in the exclusive custody of said defendant in error and said Magson its proper employe and while said mail sack containing said registered letter was in such care and custody, and by reason of the negligence of the defendant in error and of said Magson as alleged in the complaint, a third person by means of a forged or false key stole the registered letter from said mail sack; and plaintiff in error brought this action to recover the three thousand so lost.

The questions thus presented for determination in this case are as follows:

1st. Do the provisions of the statutes of the United States make a railway company carrying the mail upon notification from the Second Assistant Postmaster General liable to the owner for a loss of registered mail matter occasioned by the default, negligence or misfeasance of its ordinary private agent or employe, while said registered mail was in the exclusive care and custody of said railway company and its employ?

2d. Is section 1023, Postal Laws and Regulations, Ed. 1893, a valid rule, so that defendant in error was under obligation upon receiving the mail "at a late hour of the night to retain custody thereof by placing same in a secure and safe room or apartment of the depot or station until the following morning"?

3d. Does section 713 of Postal Laws and Regulations, 1893, control the relations of the defendant in error and the employe, Magson, in regard to the mail, and fix their status as employer and employe?

4th. Is section 713 of Postal Laws and Regulations, 1893, a valid rule, properly within the powers of the Postmaster General to establish?

5th. If, under such circumstances, the railway company is exempt from the operation of the rule of respondeat superior, is defendant in error liable as a principal, for the loss of the registered package in question, under the facts and circumstances set out in complaint?

6th. Is the defendant liable under the rule of respondeat superior for loss due to its private employe, Magson?

The facts and record set out more fully are as follows:

Plaintiff in error, an Iowa corporation, as plaintiff in the trial court on or about the 30th day of October, A. D. 1901, filed in the United States Circuit court for the district of Minnesota a substituted complaint and afterwards filed an amendment thereto. Said complaint as amended alleged in substance:

That during the period referred to in the complaint, defendant in error, the original defendant, herein referred to as the "Soo" Railway Company, was carrying the mail under the statutes of the United States, and the rules and regulations adopted by the postoffice department, upon notification from said department, for a compensation as fixed by said department, of $64,815.47 per year on the division of its road with which this case is concerned, for furnishing postal cars and for carrying the mail and the persons in charge thereof.

That there was no contract of any kind existing between said "Soo" Railway company and the United States, for the carriage of mail and the persons in charge thereof.

That postal regulation adopted in 1893, No. 713, was then in force, that Harvey, North Dakota, is an intermediate station, with its postoffice less than eighty rods from the depot of the defendant in error, and that James Magson was the employe of defendant in error. A copy of postal regulation No. 713 is set out in the third division of this brief.

Said complaint further alleged in substance:

That on or about November 10, 1900, the Metropolitan Bank, a Minnesota banking corporation, deposited for registration with the postmaster at Minneapolis, Minnesota, with letter postage and registration fee duly prepaid thereon, a package containing United States currency in the amount and of the value of $3,000.00, addressed to the German State Bank, a banking corporation at Harvey, North Dakota, and the same was duly registered. Said registered package was duly transported over defendant's line of railway through the states of Minnesota and North

Dakota to Harvey in a postal car belonging to said railway company. That the mail sack or pouch containing said registered package while in said postal car was under the exclusive control of United States postal clerks.

Also: That upon reaching the depot at Harvey, between the hours of eleven and twelve o'clock at night, the mail sack or pouch containing said registered package, duly locked, was delivered by a postal clerk on said mail car to said James Magson, the night station agent of defendant in error at Harvey, and said mail sack containing said registered package was by said night station agent taken into the depot at Harvey and hung up on the wall, or placed on the floor of said depot. That said mail sack continued in the care and custody of said night station agent during said night until delivered on the following morning to the postmistress at Harvey.

Also: That during the night said registered package was stolen through the negligence of said railway company and its said night station agent by some person who obtained access to said mail sack by means of a key which would open the same, and when the same was delivered to said postmistress at Harvey said mail sack was intact and was duly locked, but said registered package was not contained therein.

Also: That one Soule, a roadmaster or foreman in the employ of defendant in error, caused a key to be made which would unlock said mail sack, and said Soule or other person gained entrance to said depot through the negligence of said defendant and of its said night station agent Magson, and said Soule or other person unlocked said mail sack, took said package therefrom, and stole said $3,000.00 in currency.

That it was the duty of said railway company to provide a sufficient and safe receptacle or place for the safety and security of said mail sack and its contents while in its custody; but neglecting its duty in the premises, said railway company wholly failed and neglected to provide any receptacle or place for the safe or secure keeping of the same, and also failed to provide any separate room, closet or other safe receptacle capable of being securely fastened by lock and key or otherwise, in which to keep said mail sack safely against any intruder or unauthorized person, but said railway company in fact kept said mail sack in a room which was not designed for or capable of safely keeping valuable articles or property.

Also: It was also the duty of said railway company to safely care for and guard said mail sack and its contents

during the night and to place the same in the actual custody of a competent and diligent person duly sworn into the postal service of the United States and to safely deliver said mail sack and its contents, including said registered package, to the postmistress at the said postoffice in said town of Harvey.

Also: That in each and all of the foregoing matters, and in permitting an unsworn person, its said night agent Magson, to handle said mail sack, said railway company failed to perform or discharge its duty and was negligent in each of said respects, whereby said registered package was wholly lost to the owner thereof and said owner was thereby damaged in the sum of three thousand dollars.

That it was the duty of said night agent of said railway company to safely care for and guard said mail sack and its contents during the night, and to thereafter safely deliver the same postmistress at the postoffice in said town of Harvey, in all of which respects defendant's said night agent negligently failed. That while said mail sack and its contents were in the exclusive care and custody of said defendant in error and its night station agent Magson one Soule or other person, through the negligence of said night station agent, gained access to said room and to said mail sack and took from said mail sack the registered package in question and the currency therein contained, whereby said registered package was wholly lost to the owner thereof, and said owner was thereby damaged in the sum of three thousand dollars. That by reason of the negligence of the night agent as aforesaid said railway company is liable for the loss of said registered package.

Said complaint further stated that said Casualty company had insured said German State Bank against loss of the currency contained in said registered package while in the course of transmission in the registered mail, and a copy of the policy issued by said Casualty company is attached to the complaint. That said German State Bank was the owner of said currency at the time the same was lost, and proof of said loss and the interest of said bank was duly made and the full amount of said loss was paid by said Casualty company to said bank. That said Casualty company become and was thereby fully subrogated to all the rights of said bank against said railway company, and as further evidence of said subrogation an assignment in writing of said package of currency and of the claim of said bank thereto, and of its cause of action, was duly made by said bank to said Casualty company, and

a copy thereof is attached to the complaint as a part thereof.

Said Casualty company prayed for judgment against said railway company for the sum of three thousand dollars ($3,000.00) with interest and costs.

A demurrer filed to said complaint as amended was sustained on the 20th day of December A. D. 1901, by Hon. Wm. Lochren as Circuit Judge, on the ground that the same does not state facts sufficient to constitute a cause of action, which said ruling was duly excepted to. Plaintiff having elected to stand upon its complaint as amended, judgment was then entered upon the merits dismissing said case and in favor of the defendant for costs which said judgment was duly excepted to. All of the foregoing was duly entered of record.

The two opinions of the trial court in making its ruling on the demurrers filed to the original and to the substituted comlpaint are set out in the printed transcript of record filed in the Eighth United States Circuit Court of Appeals on pages 26–30, and on pages 42–43. The first opinion is contained in 113 Fed. 414.

Said case was then carried in error, to the United States Circuit Court of Appeals for the eighth circuit where the judgment below was affirmed on the 14th day of July A. D. 1902, and a final judgment was entered therein against plaintiff in error for costs. The opinion of the Circuit Court of Appeals filed in said court and cause is contained in the record (page ——) and reported in 117 Fed. 434.

A writ of error was duly allowed from this court to said Circuit Court of Appeals, by Hon. David J. Brewer, Associate Justice of this court, and said writ of error duly issued from the office of the clerk of this court on the 18th day of September, A. D. 1902.

The return to said writ, including the transcript of the record, together with the citation duly served on counsel for defendant in error, were duly made and filed in this court, in the time and manner provided by law.

DIVISION II.

SPECIFICATION OF ERRORS.

The ultimate questions of law presented by the record and the assignments of error, upon which plaintiff in error relies are as follows:

First. The Circuit Court and the Circuit Court of Appeals each erred in construing the statutes of the United States in regard to carrying the mails, especially section 4000 of the Revised Statutes of the United States, and section 1023 of the Postal Laws and Regulations, 1893, and holding that the defendant in error is not liable by reason of said statutes to care for and carry the mail safely.

Second. The Circuit Court and the Circuit Court of Appeals each erred in construing the Postal Laws and Regulations, 1893, including section 713, and holding same a nullity, and that notwithstanding said regulation the railroad employe, Magson, was a government agent in so far as he cared for, or handled the mail.

Third. The Circuit Court and the Circuit Court of Appeals each erred in ignoring the regulations of the Postmaster General, including section 713, Postal Laws and Regulations, 1893, and in treating same as void, and of no effect, and in overruling the said regulation of the Postmaster General.

Fourth. The Circuit Court and the Circuit Court of Appeals each erred in contravening the authority of the Postmaster General as set out in sections 713 and 1023 of the Postal Laws and Regulations, 1893, and by virtue of which, in the matters involved in this action, the agent, Magson, is to be held to be the employe of defendant in error, and not a government agent.

Fifth. The Circuit Court of Appeals and the Circuit Court each should have held that defendant in error as a railway company, acting under the statutes of the United States and under section 713 of the Postal Rules and Regulations, and having the exclusive care and custody of the United States mail sack containing the registered package in question, under the facts and circumstances shown in the complaint, at its station at Harvey, North Dakota, where it had an agent or representative employed, said station being less than eighty rods from an intermediate postoffice, was liable to the owner of such registered package for said company's failure to perform its statutory ob-

ligation or duty to safely care for said mail sack and its contents and that said company was liable for the consequent damage caused to such owner through the loss of such package by reason of the negligence of the ordinary unsworn agent or representative of said company; and each of said courts erred in refusing to so hold and decide.

Sixth. The Circuit Court of Appeals and the Circuit Court each should have held that defendant in error, as a railway company, acting under the statutes of the United States, and under section 713 of the Postal Rules and Regulations, and having the exclusive care and custody of the mail sack and the registered package therein contained, under the circumstances shown in the complaint, was a mere private corporation for pecuniary profit, and subject to the rule of *respondeat superior* as to such mail, and would be liable therefor if lost through the negligence of its ordinary unsworn agent or representative; and each of said courts erred in refusing to so hold and decide.

Seventh. The Circuit Court of Appeal and the Circuit Court each erred in holding that a railway company carrying the mail, under the facts alleged in the complaint, and its ordinary unsworn employee while engaged in such service, are respectively a principal public agent, and a subordinate public agent or employee, of the United States.

Eighth. Each of said courts erred in holding that a railway company, carrying the mail in connection with its ordinary business as a carrier, under the facts alleged in the complaint, was a principal public agent of the United States; and also erred in holding that the ordinary unsworn employee of said railway company, while engaged in caring for the mail in connection with his ordinary duties as such employe, was a subordinate public agent or employe of the United States.

Ninth. The Circuit Court of Appeals and the Circuit Court each erred in holding that Magson was not the private unsworn agent or employee of defendant in error but was a public agent or employe in the postal service of the United States, when caring for mail delivered to him under Sec. 713 of the postal regulations of 1893; and erred in refusing to give effect to the part of said regulation providing that persons so employed by said companies are agents of the companies and not employes of the postal service.

Tenth. Each of said courts erred in holding that a railway company carrying the mail in connection with its ordinary business as a carrier, under the facts alleged in the complaint; was exempt from liability for a loss of mail

caused by the negligence of its ordinary unsworn employee having the care and custody of the mail in connection with his usual duties as such employee, and in giving to said railway company, in effect, the same exemption from liability which a public officer is entitled to for the default, negligence or misfeasance of his subordinate in the public service.

Eleventh. Each of said courts erred in holding that a railway company carrying the mail is, in effect, a public officer of the United States, and also erred in holding that an ordinary unsworn employee of such railway company, when concerned in the carriage of the mail, is, in effect, a subordinate public agent or employee of the United States.

Twelfth. Each of said courts erred in holding that the complaint as amended did not state a cause of action against said railway company, considered as a principal public agent, for its own negligence in failing to provide a sufficient and safe place and a proper and competent person for the safe care and custody of mail while in its actual care and custody.

DIVISION III.

THE CONSTITUTION STATUES OF THE UNITED STATES AND THE RULES AND REGULATIONS OF THE POST OFFICE DEPARTMENT.

The provisions of the United States Constitution and and statutes and the rules and regulations of the Post Office Department which plaintiff in error presents as controlling in this case are as follows:

CONSTITUTION OF THE UNITED STATES: Art. 1, Sec. 8, Par. 7, of the Constitution provides: The Congress shall have power * to establish Post Offices and Post Roads.

THE STATUTE OF THE UNITED STATES PROVIDES:

R. S. SEC. 3964: The following are established as post roads. * All railroads or parts of railroads which are now or hereafter may be in operation.

R. S. SEC. 3695: The Postmaster General shall provide for carrying the mail on the post roads established by law, as often as he, having due regard to productiveness and other circumstances, may think proper.

ACT. OF MARCH 3, 1879, SEC. 3: The Postmaster Genenral shall, in all cases, decide upon what trains and in what manner the mails shall be conveyed.

SAME ACT. SEC 33: * and all acts or parts of acts inconsistent with the provisions of this act, are hereby repealed. (*20 Stat. L. 355, ch. 180; 1. Supp. p. 246.*)

R. S. SEC. 4000: Every railway company carrying the mail shall carry on any train which may run over its road, and without extra charge therefor, all mailable matter directed to be carried thereon, with the person in charge of the same.

The original enactment provided for the Registered mail system was as follows:

R. S. SEC. 3926: For the greater security of valuable mail matter, the Postmaster General may establish a uniform system of registration. But the Post Office Department or its revenue shall not be liable for the loss of any mail matter on account of its having been registered.

The subsequent act on the same subject is as follows:

ACT OF FEBRUARY 27, 1897, SEC. 3926: For the greater security of valuable mail matter the Postmaster General

may establish a uniform system of registration, and as a part of such system he may provide rules under which the senders or owners of first class registered matter shall be indemified for losses thereof in the mails, the indemnity to be paid out of the postal revenues, but in no case to exceed ten dollars for any one registered piece, or the actual value thereof when it is less than ten dollars, and for which no other compensation or reimbursement to the loser has been made:

Provided, that the Postoffice Department or its revenues shall not be liable for the loss of any other mail matter on account of its having been registered.

R. S., SEC. 4026: The Postmaster General may appoint clerks for the purpose of assorting and distributing the mail in railway postoffices, each of whom shall be paid out of the appropriation for transportation of the mail (at rates stated).

ACT OF MARCH 3, 1887: That the Postmaster General be, and he is hereby authorized to employ such mail-messenger service as may be necessary for the carriage of the mails in connection with railroad and steamboat service, transfer service between depots, over bridges or ferries, between postoffices, postoffice and branch offices or stations, in cases where by the laws and regulations of the Postoffice department, railroad companies, steamboat companies, and the masters of vessels are not required to deliver into and take from the postoffices the mails carried on their lines or vessels. (*24 St. L. 492, Ch. 346; 1 Supp. p. 557.*)

POSTAL REGULATIONS: The following postal regulation was adopted by the Postmaster General in the year A. D. 1893, and was in force at the time in question in this case, towit:

SEC. 713. Every railroad company is required to take the mails from and deliver them into all terminal postoffices; whatever may be the distance between the station and the postoffice, except in cities where other provisions for such service are made by the department. In all cases where the department has not made other provision, the distance between terminal postoffices and nearest station is computed in, and paid for as part of the lenghth of the route.

The railroad company will also be required to take the mails from and deliver them into all intermediate postoffices and postal stations located not more than 80 rods from the nearest railroad station at which the company has an agent or other representative employed.

The department will provide for the carrying of mails to and from intermediate postoffices and postal stations

located not more than 80 rods from the nearest railroad office or station; and also to and from intermediate postoffices and postal stations located 80 rods or less from railroad office or station when the railroad company has no agent employed at such office or station. In all cases the distance between railway office or station and the postoffice or postal station must be measured by the shortest practicable road open to public travel, At all points where the department deems the exchange of mails necessary the speed of trains must be slackened so as to permit the exchange to be made in safety.

At places where the railroad companies are required to take the mails from and deliver them into postoffices or postal stations the persons employed by the railroad companies to perform such service are agents of the companies and not employees of the postal service and need not be sworn as employees of such service; but must be more than sixteen years old and of suitable intelligence and character.

Postmasters will promptly reprt to the proper division superintendent of the railway mail service or the general superintendent thereof any violation of this requirement.

SEC. 1023, POSTAL LAWS AND REGULATIONS, ED. 1893: Whenever the mail on any railroad route arrives at a late hour of the night the railroad company must retain custody thereof by placing the same in a secure and safe room or apartment of the depot or station until the following morning, when it must be delivered at the postoffice.

Note: This mail in suit arrived at Harvey, North Dakota, about eleven o'clock at night.

POSTAL OATH. ACT. OF MARCH 5, 1874, SEC. 15: That before entering upon the duties, and before they shall receive any salary, the Postmaster General, and all persons employed in the postal service, shall respectively take and subscribe before some magistrate or other competent officer authorized to administer oaths by the laws of the United States, or of any state or territory, the following oath or affirmation:

"I, A. B., do solemnly swear (or affirm, as the case "may be) that I will faithfully perform all the duties re- "quired of me and abstain from everything forbidden by "the laws in relation to the establishment of postoffices "and post roads within the United States; and that I will "honestly and truly account for and pay over any money "belonging to the said United States which may come into "my possession or control.

"And I also further swear (or affirm) that I will sup- "port the Constitution of the United States, so help me "God." *(18 Stat. L. 19, Ch. 46; 1 Supp. p. 5.)*

DIVISION IV.

JURISDICTION OF THIS COURT IN ERROR.

The record shows that this case was commenced in the United States Circuit court for the district of Minnesota, taken thence in error to the Eighth United States Circuit Court of Appeals, and brought from that court in error to this court.

The record also shows that there was diverse citizenship of the parties, but the jurisdiction of the circuit court did not depend entirely on that ground. as the case also involved the construction and application of the statutes of the United States relating to the carriage of the mail by railway and of Postal Regulations including sections No. 713 and 1023 Ed. 1893, concerning the duty of a Railway Company to receive mail carried along its line of Railroad, to care for and deliver it into the local Post Office, at intermediate stations where the distance between the Railway Station and the Post Office is less than 80 rods, a fact shown to exist in the case at bar.

And making the employe of the railway so doing this service, for and on behalf of the railway, the private employee of the railway, and not a Government employee or agent.

The question of the duty of the postmaster, under the Federal Statutes. and his liability for violation of such duty, was considered by this Court on writ of error to the New York Court of Appeals in *Teal vs. Felton* (*12 Howard, 284*). This is clearly a precedent for the jurisdiction of this Court in the case at bar, as the question to be determined is identical with the Teal case.

The decisive questions in this case turn upon the construction of, and effect to be given to Statutes of the United States, and Postal Laws and Regulations applicable to the matters involved. If these are held to be valid then the other propositions of law follow as corollary therto, but not as the basic questions of the case.

It seems to plaintiff in error that the relations between the defendant in error, and its employee, Magson, are fixed and effectively defined by Section 713, Postal Laws and Regulations, ed. 1893, and the provisions of that regulation should have been followed by both the Circuit Court and the Circuit Court of Appeals. The decision improperly sets same aside as counting for naught, while we believe it

is a valid order of the Postmaster General, binding upon the defendant in error. It is apparent that the construction and weight to be given to this regulation, and the powers of the Postmaster General involved therein, is a basic question in this case. Even conceding the common law to be as held by the courts below, still if these Statutes and Postal Laws and Regulations are valid, having the force of statute, then the relations are by virtue of these statutory provisions, as we aver, and not as defined by the courts below. As a matter of course, in law, if Magson was, as this regulation provides, the employee of the defendant in error, then it is liable under the rule of respondeat superior, while if this regulation is invalid, then it has no weight in the case, and its provisions might not make the rule of respondeat superior apply. While the rule of respondeat superior is a common law question, the power of the Postmaster General, and the validity of this regulation, which is the question under discussion, is one of statute of the United States, and the power of a department of the Government thereunder.

The duties of the railroad to carry the mails safely is involved in, and depends upon the construction of the Acts of Congress, defining their duties, especially Section 4000 of the Revised Statute of the United Stated, and the Postal Laws and Regulations, including Section 1023, ed. 1893.

The Statutes of the United States, quoted in Division Three of this brief, are construed by the Circuit Court, and Circuit Court of Appeals, and they hold that they do not create a statutory duty charging the defendant in error to carry the mail safely. Section 1023, Postal Laws and Regulations, Ed. 1893, reads: "Whenever the mail on any railroad route arrives at a late hour of the night, the railroad company must retain custody thereof by placing the same in a secure and safe room or apartment of the depot or station until the following morning, when it must be delivered at the postoffice." Each of the lower courts fail to construe this regulation as binding, or that failing to comply therewith, is negligence on the part of the defendant in error and a failure to perform a statutory duty, in effect setting aside the regulation of the Postoffice Department as a nullity.

In the opinion of the Circuit Court of Appeals, the learned Judge (Garland) who spoke for the Court said: "To illustrate: Supposing the agent Magson had left the "mail-sack on the depot platform, and by reason thereof "the same had been stolen. This, in the absence of any "showing that defendant in error had not used proper care

"in the selection of Magson as its agent, would have been "the negligence of Magson, for which he would have been "liable, but it would not have been the negligence of de- "fendant in error." (*Circ. Ct. of App. Trans. p. 55; 117 F. 434.*)

Section 713, Postal Laws and Regulations, Ed. 1893, says: "At places where the railroad companies are required to take the mails from and deliver them into post-offices or postal stations (being the case at bar) the persons employed by the railroad companies to perform such services *are agents of the companies, and not employees of the postal service,*" etc.

The Circuit Court and Circuit Court of Appeals for the Eighth Circuit in deciding this case say: "This reasoning would make the defendant in error a public agent, but would deny that position to the agent at Harvey; the subordinate agent of the defendant in error * * *. The United States only can carry the mail, hence, we believe that the character of the service in which the agent is engaged must determine in the case at bar, as to whether the subordinate agents of the defendants in error, in so far as they were engaged in carrying the mail, were or were not public agents * * *. We are satisfied, however, that if the negligence of any one directly contributed to the larceny, it was the negligence of Magson, for whose negligence in the matter of carrying the mail, the defendant in error is not liable." Transcript C. C. App. p. —.

Note—Magson is the employee of the railroad company at Harvey, employed by defendant in error, to perform the duty of defendant in error in caring for the mail. Section 1023, Postal Laws and Regulations, Ed. 1893, provides: "Whenever the mail on any railroad route arrives at a late hour of the night, the railroad company must retain custody thereof by placing the same in a secure and safe room or apartment of the depot or station, until the following morning, when it must be delivered at the postoffice." The complaint charges that this was not done, and no such "secure and safe room or apartment" was furnished by defendant in error. The Courts below held that the defendant in error is not required to do so.

The Statutes of the United States likewise impose a duty upon defendant in error to have cared for this mail safely.

The decision of each of the lower courts is in direct conflict with the Postal Regulations and Statutes as quoted. These questions are the basic ones upon which the issues of this case determines. The regulations quoted are in

effect and force statutes, the lower courts having committed the error of misconstruing and nullifying these statutes. This Court is called upon to correct this error. construing these statutes and regulations giving them the legal standing they merit, and validating the action of the Postmaster General in their promulgation as within the proper powers appertaining to his office.

The Postal Regulations quoted were in force at the time this loss occurred, and are still in force.

The case also involves, on the facts stated in the complaint, the question of exemption of a railway company, carrying the mail, from liability under the rule of respondeat superior. either as a public agent of the United States, or as a private corporation for profit, performing the duty in question, established by the Statutes of the United States, the Circuit Court of Appeals and the Circuit Court having each held, in effect, that the railway company was entitled to the exemption in this respect which the law gives to one who is strictly a principal public officer.

This case comes within the exception contained in section 6 of the Judiciary (Circuit Court of Appeals) Act of 1891, as follows:

"In all cases not hereinbefore, in this section, made final, "there shall be of right an appeal or writ of error or re- "view of the case by the Supreme Court of the United "States, where the matter in controversy shall exceed One "Thousand Dollars, besides costs." (*1 Supp. U. S. Stats. p. 904.*)

This case falls within the provision above quoted, as construed by several decisions of this court.

184 *U. S.* 676, (46 *Law* 754); *Howard v. U. S. to use of Stewart*, (1902); and cited cases.

187 *U. S.* 41; *Robinson & Co. v. Belt.* (1902).

185 *U. S.* 505, (46 *Law* 1012:) *McFaddin v. Evans-Snider-Buel Co.* (1902.)

184 *U. S.* 258, (46 *Law* 528); *Studebaker v. Perry* (1902.)

184 *U. S.* 173, (46 *Law* 487); *Marande v. Tex. & P. R. Co.* (1902).

164 *U. S.* 105, (41 *Law* 367); *Press Pub. Co. v. Monroe* (1896).

175 *U. S.* 262, (44 *Law* 156); *Bolles v. Outing Co.* (1899).

175 *U. S.* 148, (44 *Law* 109); *Brady v. Daly* (1899).

174 *U. S.* 125, (43 *Law* 920); *Auten v. U. S. National Bank* (1899).

172 *U. S.* 401, (43 *Law* 493); *Sonnentheil v. C. M. Brewing Co.* (1899).

158 *U. S.* 326, (39 *Law* 1003); *Union P. R. Co. v. Harris* (1895).

144 *U. S.* 465, (36 *Law* 506); *N. Pac. R. Co. v. Amato* (1892).

A Writ of Certiorari was also asked in this case by motion and petition submitted on December 15, 1902, which was denied on December 22, 1902. We respectfully call attention to a recent decision where, on final disposition of the case, a Writ of Certiorari was allowed, in the event such procedsure should hereafter be deemed necessary and proper in the further progress of this case.

187 *U. S.* 237; *Security Trust Co. v. Dent.* (1902.)

DIVISION. V.

THE DUTY OF A RAILROAD COMPANY TO CARRY THE MAIL SAFELY.

The care and carriage of the mail has always has been divided into two principal branches governed by different statutory provisions, one of which has been entrusted to the exclusive care and custody of those subsequently adjudged to be principal public officers and their subordinates in the public service, while the other has been placed in charge of persons, natural, corporate or artificial, who were not public officers, and of the ordinary private employees of such persons.

POSTAL SYSTEM UNDER THE CONSTITUTION: Concerning the postal system the Constitution provided: "The Congress shall have power * to establish postoffices and Post Roads." (*Art. 1, Sec. 8, Par. 7.*)

This court stated in an opinion by Mr. Chief Justice Fuller that: "In *Ex Parte Jackson, 96 U. S. 727, 24 Law* "*877, (1878,)* it was held that the power vested in Congress "to establish postoffices and post roads embraced the reg- "ulation of the entire postal system of the country, and "that under it Congress may designate what may be car- "ried in the mail and what excluded; that in excluding "various articles from the mails the object of Congress is "not to interfere with the freedom of the press or with "any other rights of the people, but to refuse the facilities "for the distribution of matter deemed injurious by Con- "gress to the public morals. When the power to establish "postoffices and postroads was surrendered to the Con- "gress, *it was as a complete power*, and the grant carried "with it the right to exercise all the powers which made "that power effective." (*P. 134; Law p. 102.*)

143 U. S. 132, (36 Law 102); Ex Parte Rapier, (1891).

The effect to be given to powers conferred by the Constitution on Congress was also considered by this court in:

4 Wheat 400, (4 Law 600); McCulloch v. State of Maryland (1819).

16 Pet. 608 (10 Law 1086); Prigg v. Commonwealth of Pennsylvania (1842).

144 *U. S.* 263 (36 *Law* 429); *Logan v. U. S.* (1892).

The court of Claims has maintained the power of Con-

gress to compel the carriage of mail by sea, in steamships having United States registry. That court said:

"During the period now under consideration, United "States steamships *were by law forced to take the United States "mail* whether they wished to do so or not, (*Sec.* 3976 *and "Sec.* 4203 *R. S., repealed June* 26, 1884; *Ch*, 121, *Vol.* 23, "*Stat. L.*), and moreover to take them at such rate as the "Postmaster General chose to allow (subject to a maximum "limitation only). He had despotic power—we do not "doubt he used it fairly and wisely." (Pg 19.)

28 *Ct. Claims* 15; *Pacific M. S. S. Co. v. U. S.* (1892).

The Wisconsin Supreme Court in *Muster v. Chicago, M. & St. P. R. Co.*, said: "The government compels the com- "pany to carry the mails and designates the trains upon "same shall be carried."

61 *Wis.* 325. (21 *N. W. R.* 252); *Muster v. Chicago, M. & St. P. Ry. Co.* (1884).

We will now briefly refer to the statutes of the United States and the decisions concerning the carriage of the mail which divide the postal system into the two principal branches above referred to, the Revised Statutes being re-enactments of prior laws.

The Revised Statutes of the United States, (1878 Ed.,) Sec. 3850 provides that: "No postmaster, assistant post- "master, or clerk employed in any postoffice shall be a con- "tractor or concerned in any contract for carrying the "mail."

The duties of a postmaster and of his subordinates are to receive, safely care for, distribute and deliver to the person entitled thereto, or to the proper carrier, mail matter deposited or received in his office, and such duties are fixed by statutes relating to those particular officers with which we are not concerned in this case.

A postmaster is not a carrier of the mail.

8 *Watts (Pa.)*453; *Schroyer v. Lynch.* (1839.)

A mail contractor or railway company transporting the mail does not handle the individual pieces of mail, but receives such mail matter enclosed in locked mail pouches or mail sacks.

The carriage of mail by land was for many years provided for exclusively by express written contracts entered into between the contractor and the government.

It is said that railways were first used by the United States for postal purposes in 1334.

10 *World's History and its Makers, p.* 45.

The general introduction of railroads into England and the United States from about 1845 to 1850, and their subsequent enormous development, with the tremendous increase of the volume of mail matter to be carried, due to greater dispatch, cheaper rates of postage and the rapid growth of all business interests, have made necessary certain changes, from time to time, in this method of providing for carriage of the mails.

The Act of Victoria (1 and 2 Vict., Ch. 98,) containing the provision for the carriage by railway of the mail and the person in charge thereof, was adopted in 1847. The same provision, in almost identical terms, was enacted by the United States in 1872, and now appears as U. S. Rev. St. Sec. 4000. Subsequent reference is made to this matter in this division of the Brief.

All railroads are established as "postal routes." (R. S. Sec. 3964.) No advertising for bids was required to authorize the Postmaster General to enter into express written contracts with railway companies for carrying the mail. (*R. S. Sec.* 3942; *Act of May* 17, 1878, *Chap.* 107; 20 *St. L.* 61, 1 *Supp. p.* 164.)

But the carriage of mail by railroad was still required to be done under express written contracts, made in accordance with the provisions of the Revised Statutes.

This edition of the Revised Statutes (1878), included all Acts of Congress enacted by the 44th Congress, ending March A. D. 1877, and was certified to by the Hon. Wm. M. Evarts, Secretary of State, on February 18th, 1878.

In 1879 an Act of Congress was passed which contained the following provisions:

SEC. 3: The Postmaster General shall in all cases decide upon which train and *in what manner* the mails shall be conveyed.

SEC. 33: * and all acts or parts of acts inconsistent with the provisions of this act, are hereby repealed.

(*Act of March* 3, 1879, *ch.* 180; 20 *St. L. 355;* 1 *Supp. pgs.* 245, 250.)

The Postoffice department construed the Revised Statutes then in force, together with the Act of March 3, 1879, above set forth, as empowering the department to require railroads to carry mail upon notification from the Department, for a compensation for the use of postal cars belonging to the railway company and for the carriage of the mail and the person in charge thereof fixed by the Department at the maximum allowed by Acts of Congress,

cited in the third division of this brief. This service is called by the Department "recognized service."

A case involving the subject of *recognized service* was before this court in 1896.

164 *U. S.* 94, (41 *Law* 363); *Central P. R. Co. v. U. S.* 1896).

Another case involving the same class of service was decided by the Alabama Supreme Court in 1884.

76 *Ala.* 357; *Central R. & B. Co. v. Lampley.* (1884.)

There was also one before the Court of Claims concerning the compensation of the Railway Company carrying the mail.

24 *Ct. of Cl.* 355; *Minneapolis & St. L. R. Co. v. U. S.* (1889.)

These are the only cases of "recognized service" discovered by counsel, which have been before the courts prior to this case.

No express contracts have been entered into between the government and any railway company since a short time after the passage of the Act of March 3d, 1879.

In this case the complaint alleges that the mail was being carried by the defendant in error upon notification from the Postoffice Department for a compensation fixed by the department in accordance with law for use of its postal cars and for the carriage of the mail and the person in charge thereof. (Trans. p. 34).

The complaint further alleges: "That during all of the "period hereinbefore referred to, there was no contract of "any kind between defendant and the United States Gov- "ernment, concerning or providing for the carriage, by de- "fendant, of said mails, or any part thereof, or of the per- "son in charge of said mails, upon or along defendant's said "line of railway or any part thereof." (Trans. p. 32).

Where the distance between a railway station and the postoffice is not more than 80 rods, the agent or representative of the railway company is required to take mails from and deliver them into the postoffice.

At places where the railroad companies are required to take the mails from and deliver them into postoffices or postal stations the persons employed by the railroad companies to perform such service are agents of the companies and not employees of the postal service." (Postal Regulations No. 713; Supra, Div. 3; Trans. p. 34.)

At all other places the mail is transported between the

postoffice and railway station by transfer contractors or transfer clerks.

DEPARTMENT REGULATIONS: The provisions of the Revised Statutes concerning departmental regulations, powers and duties of the Postoffice Department are contained in R. S Secs. 158, 161 ad 396, (pars. 2 and 9). Also the Act of February 27, 1897, enacting a new Sec. 3926 concerning registered mail, which has been previously set out in this brief.

This court takes judicial notice of such rules and regulations.

152 *U. S.* 221, (38 *Law* 419); *Caba v. U. S.* (1894).

If it is claimed that such regulations are not consistent with law, the same rule of decision is applied as when an Act of Congress is assailed as unconstitutional.

177 *U. S.* 465, (44 *Law* 849); *Boske v. Comingore.* (1900.)

Such regulations, at any rate when they have been recognized by Congress, have the force of law.

116 *U. S.* 181, (29 *Law 605*); *Smith v. Whitney.* (1886.)

4 *How U. S.* 117, (11 *Law* 901); *Gratiot v. U. S.* (1846.)

100 *U. S.* (10 *Otto*) 13, (25 *Law* 539); *Ex Parte Reed.* (1879.)

The regulation in question is recognized by the Act of March 3d, 1887. previously quoted, which made provision for the transfer of mails where the Regulations of the Postoffice department did not require railroad companies to deliver into and take from the postoffice the mails carried on their lines.

This regulation was then in force. A regulation containing this identical requirement has been in force ever since the mails have been carried by railways. This subject was discussed by the Court of Claims, and this regulation as Section 349 of the Postal Regulations of 1873 and as Section 639 of the Regulations of 1879 are set out in the opinion of that Court.

24 *Ct. Cl.* 355; *Minneapolis & St. L. R. Co. v. U. S.* (1889.)

Defendant in error has acquiesced therein within the rule established in,

164 *U. S.* 93, (41 *Law* 362); *Cent. P. R. Co. v. U. S.* (1896.)

Having undertaken the duty of carrying for this mail sack under terms imposed by Sec. 713 and 1023 of Postal Laws and Regulations' 1893, they can hardly avoid the liability following, and assumed thereunder.

Another early case reads: "As to an action on the case "lying against the party really offending. there can be no "doubt of it, for whoever does an act by which another re- "ceives an injury, is liable in an action for the injury sus- "tained. * So is the Postmaster (General) for any default "of his own." (p. 765.)

2 *Cowper's R.* 754; *Whitfield v. Lord le de Spencer.* (1778.)

All cases referred to in this brief, whether decided by the State, Federal or English Courts, without exception, hold that the duty of the person in charge of mail is one owing to the owner of the mail, so that for loss thereof or injury thereto the owner may maintain action against the person offending.

The fact that there are a large number of letters, the property of one addressee, which it may be necessary, for convenience in handling or storing, to gather together and tie up in bunches or bundles, does not change or affect the nature of this duty.

In *American School v. McAnnulty*, 187 U. S. 94, petitioner alleged that that it was receiving 3,000 letters a day, amounting to 25,000 letters when its bill was filed, the same containing at least $10,000 in money. The duty of the Postmaster General and of the local Postmaster to the owner of the mail was not changed, in any manner or degree, because of the large number of letters.

187 *U. S.* 94; *American School of Mag. H. v. McAnnulty.* (1902.)

All mail matter deposited in a Postoffice is placed there for the purpose of transmission or transportation from the sender to the addressee. The fact that. for convenience of transportation, mail matter owned by different persons is gathered together, tied up in bundles and enclosed in mail sacks, does not affect or change the nature of this duty. The public at large has no interest in or concern with the several pieces of mail belonging to the individual owners thereof. The owners of mail in bundles or sacks have no interest whatever in any mail therein contained except their own.

It resembles the duty owing to an individual lawfully upon a street while construction or repairs are being made upon an overhead bridge or viaduct. The duty to exercise care is due to each individual passing under the bridge. The public generally, who are not under the bridge, and individuals, when not under the bridge are not affected by the operation being carried on.

Under such circumstances one injured through the negligence of those in charge of such work could recover therefor. Nor would the duty or liability be changed because a number of individuals were enclosed in a street car passing under the viaduct or bridge and through negligence a girder or other heavy body fell striking the street car and injuring one or more passengers therein.

The cited cases settle the law as to the liability or exemption from liability of a public officer in charge of the mail, for the default, negligence or misfeasance of his private employee, and for his own personal default, as well as the limitations upon the powers of the public officers of the United States engaged in the Postal Service.

The Source of the Obligation to carry mail safely: The statutes of the United States authorize the Postmaster General to provide for carrying mail on all post roads established by law (R. S. Sec. 3965), and in all cases to decide upon what trains and in what manner the mails shall be carried. (Act. of March 3, 1879, cited supra.)

R. S. Sec. 4000 provides: "Every railway company "carrying the mail shall carry on any train which may run "over its road, and without extra charge therefor, all mail-"able matter directed to be carried thereon, with the per-"son in charge of the same."

Sec. 1023, Postal Laws and Regulations, Ed. 1893, pro-"vides, the railroad company must retain custody thereof "(the mail) by placing the same in a secure and safe room "or apartment of the depot or station until the following "morning, when it must be delivered at the postoffice."

No right to sue the United States is anywhere conferred, for damages caused by the loss of mail matter, registered or unregistered; nor is a carrier of the mail relieved by any statute from any liability arising from the loss of mail matter caused by the default, negligence or misfeasance of its employee.

The statutes of the United States cotemplate that valuable articles may be sent by registered mail, and Congress has not placed any limitation upon the value of the articles which may be transmitted, nnr, at any time in question in this case, had any limitation on such amount been fixed by postal regulations established by the Postmaster General.

It will be observed that R. S. Sec. 4000 povides: (1) for the carriage of the mail, and (2) for the carriage of the person in charge of the mail. The obligation to carry the property and person is imposed by the same statute in identical terms.

Plaintiff in error contends that whether there is an express contract, or an implied contract or no contract for the carriage of the mail, the obligation to carry safely is one imposed by law. The repetition in an express contract of an obligation imposed by statute neither adds to nor in any manner effects the duty imposed by law. Nor would the omission from the contract of an obligation imposed by the statute diminish or in any manner effect the duty thus imposed by law.

And if there was an implied contract, the terms of which were composed of "the statutes of the United States and the regulations "of the department" (as was held by the Court of Claims in a case of this character, 24 Ct of Cl. 360; *Minneapolis & St. L. R'y Co. v. U. S.*, 1889), the Statutes of the United would not cease to have the force and effect of law, because, for certain purposes, those statutes are treated as parts of an implied contract, but the duties or obligations imposed upon the railway company by said statutes continue to be duties and obligations imposed by law.

Defendant in error contends that the relation between the government and the railroad company. for the carriage of the mail, is contractual and that the owner of mail, not being a party to or in privity with any party to said contract, cannot maintain an action for a loss caused by a breach of such contract.

The learned Circuit judge on this point held with defendant in error. The Circuit Court of Appeals stated that it was unnecessary to determine this contention. in the view it took of the case.

Plaintiff in error contends that this action does not turn upon the question of a contract or no contract existing between the defendant in error and the United States; such contract is a collateral and unimportant feature. The Statutes and Regulations of the Postoffice Department are set out as defining the duties of the defendant in error. The duty of the owner of the registered package lost is independent of any contract or question of relations growing out of a contract between defendant in error and the Government, and this action lies for damages to the owner of the registered package, because of the failure of the defendant in error in its duty, independent of any such contract.

In 1851, an English statute, identical with R. S. Sec. 4000, was construed by the Court of Queen's Bench, in the case of *Collett v. London & N. W. R'y. Co.* (20 L. J. 411) A

synopsis of the English Act, 1 and 2 Vict. Ch, 98, Secs. 1, 6 and 7, is made by defendant's counsel. (Law Journ. p. 413 – left column).

The action was for damages to a railway mail clerk, caused by the negligence of defendant's employee.

There was a contract between the government and the railway company for the carriage of the mail and the person in charge thereof. The complaint alleged that "it "became and was the duty of said company to use due and "proper care and skill in and about the carrying and con-"veying the plaintiff;" plaintiff then alleged certain negligence and special damages. (p. 412.)

A demurrer to the complaint raised the question "that "the declaration did not disclose sufficient to show that "any duty as respects carriage existed between the plain-"tiff and the company, or that if any such duty existed, "that there has been a violation of it." (p. 412.)

Opinions were handed down in this case by Campbell, C. J., and by Patterson, Wightman and Earle, J. J., all affirming defendant's liability, as follows:

Campbell, C. J., "There is, I think, no doubt at "all in this case. The allegations in the declaration that "it was the duty of the defendants to use due and proper "care and skill in and about carrying and conveying of the "plaintiff, is made out in point of law. **That duty does not "arise from any contract with the plaintiff but from the obligation "imposed by the legislature upon the company to carry the mail bags and "the officers of the postoffice in charge of the letters, and if it be the "the duty of the company to carry the plaintiff at all, it must be their "duty in doing so to use reasonable care and skill. It cannot be said "that it is enough for the company to bring the dead body to the end "of the journey. It is their duty to take care that reasonable care and skill is used, and here a breach of that duty is alleged, and the "plaintiff is entitled to maintain an action for the injury he has "thereby sustained."** (pp. 413, 414.)

Patterson, J.: "This is not a matter of contract, but a "duty cast upon the company by an Act of Parliment. * "There is no contract in the case at all but an obligation is "cast upon the company to carry, and the duty arising out "of that is to carry safely and securely a breach of which is "alleged here. (p. 414.)

Wightman, J.: "I am of the same opinion. The duty "alleged arises not from any contract, but from the obli-"gation cast upon the company by the Act of Parliament." (p. 414.)

Earle, J.: "The defendants have cast upon them the

"public duty of carrying persons in the situation of public "servants, and they have been guilty of a breach of that "duty, which has resulted in special damage to the plain- "tiff. This, therefore, is the common form of an action on "the case for the non-performance of a public duty." (p. 414.) Judgment for plaintiff.

20 *Law Journal* 411, (16 *Q. B.* 984); *Collett v. London & N. W. Ry. Co.* (1851.)

It will be noticed that the English Act considered in the *Collett* case was enacted prior to 1851. This provision was subsequently enacted by the Congress of the United States on June 8, 1872.

Act of June 8, 1872; Ch. 335, Sec. 213, V. 17, p. 309.

Rev. St. of U. S., (1878); Marginal Notes to Secs. 4000 and 3964.

Rev. St. of U. S., (1878); Reference Index, p. 1156, left column, Sec. 213.

2 U. S. Compiled Stat., (1901); p. 2719, Sec. 4000.

The effect of the adoption of a foreign statute; in relation to the decisions of foreign courts in the construction of such statute, was considered by this Court, in the case of *Robinson v. Belt*, 187 U. S. 41, where this Court said:

In more than one case we have had occasion to hold that, if a foreign statute be adopted in this country, the decisions of foreign courts in the construction of such statute should be considered as incorporated into it. Thus in *Pennock v. Dialogue*, 2 Pet. 1, 7 L. ed 327, it *was said* by Mr. Justice Story (p. 18, Law p. 333): "It is doubtless "true, as has been suggested at the bar, that where Eng- "lish statutes, such, for instance, as the statute of frauds "and the statute of limitations, have been adopted into our "own legislation, the known and settled construction of "those statutes by courts of law has been considered as "silently incorporated into the acts, or has been received "with all the weight of authority." In speaking of our patent act, which was largely taken from the English statute of monopolies, he says (p. 20, Law p. 334): "The words "of our statute are not identical with those of the statute "of James, but it can scarcely admit of doubt that they "must have been within the contemplation of those by "whom it was framed, as well as the construction which "had been put upon them by Lord Coke."

In 1867, the Virginia Supreme Court decided an action to recover for money lost out of the mail through the negligence of an employee of a mail contractor. There was a

contract between the government and the mail contractor. The opinion said: "And it is equally clear that the fact "that Sawyer's obligation to carry the mail arose under "a contract with the government, and that he made no con- "tract with Corse, is no answer to the present action, "which is not founned on contract, *but on the breach of "duty.*" (pp. 238, 239.)

The Virginia court cited the *Collett* case as authority that the liability arose from a failure to perform a duty imposed by law. (p. 242.)

17 *Gratt.* (*Va.*) 230; *Sawyer v. Corse.* (1867.)

In 1884, the Albama Supreme Court decided an action brought to recover the value of money lost through the negligence of an employee of a railway company carrying the mail upon notification and without contract. The court said: "We approve and adopt the legal propositions "as to the liability of a contractor, maintained and asserted "in Sawyer v. Corse, 17 Gratt. 230. (p. 366.)

76 *Ala.* 357: *Central R. R. & B. Co. v. Lampley.* (1884.)

In 1857 a case of personal injury to a railway mail clerk caused by the negligence of an employee was before the New York Court of Appeals. There was a contract between the government and the railway company, and it was suggested that the compensation was paid by the goverment for the carriage of the mail, but that the mail clerk was carried without compensation.

The court said: "It necessarily follows that it (de- "fendant's liability) must rest exclusively upon that obli- "gation which the law always imposes upon everyone who "attempts to do anything, even gratuitously, for another, "to exercise some degree of care and skill in the perform "ance of what he has undertaken. (p. 447.)

"The duty arises in such cases, I apprehend, entirely "independent of any contract, either expressed or implied. (p. 448.)

"But where there is anything in the circumstances to "to create a duty, either to an individual or the public, "any neglect to perform that duty, from which injury "arises is actionable. (p. 449.) There can be no material "difference between a gratuitous undertaking to transport "property, and a similar undertaking to transport a per- "son. If either are injured through the culpable careless- "ness of the carrier, he is liable." (p. 449.)

15 *N. Y.* 444; *Nolton v. Western R. Corp.* (1857.)

In 1884, another case of personal injury to a railway

mail clerk, caused by the negligence of an employee of a railway company, was before the New York Court of Appeals, which said: "*The absolute duty* of providing a car "for the transportation of the mail, and of carrying the "such mail and the persons in charge thereof, *is imposed by "the statute, and an imperative obligation for its performance. "rests upon the corporation* accepting the public mails for "the purpose of transportation." (p. 574.)

95 *N. Y.* 563; *Seybolt v. N. Y., Lake Erie & W. R. R. Co.* (1884.)

The Supreme Court of Missouri, in actions for personal injury to a railway mail clerk caused by the negligence of an employee of a railway company, held that a railway company owes to a railway mail clerk the duty to carry him safely, and that so far as concerned safe transportation, he was a passenger.

102 *Mo.* 540; *Magoffin v. Mo. Pac. Ry. Co.* (1890.)

105 *Mo.* 455; *Mellor v. Mo. Pac. Ry. Co.* (1891.)

In a Massachusetts case, Slavens & Co. were transfer mail-contractors. Their employees, together with a U. S. railway transfer clerk, unloaded mail from trains operated by the Old Colony Railroad, placed the mail on a sidewalk adjoining the depot, then loaded it on wagons and delivered at the postoffice. This sidewalk furnished ingress and egress to passengers to and from the railway depot.

Amory was injured by falling over a mail sack thus left on the sidewalk. Amory recovered damages for this personal injury from the railroad company; and after paying the judgment, the railroad company recovered the amount so paid from the transfer contractors, Slavens & Co.

Whatever the employees of the railroad company and the transfer contractor did or failed to do, was done or omitted by them in carrying and caring for the mail, on behalf of their respective employers.

148 *Mass.* 363; *Old Colony Rd. v. Slavens.* (1889.)

Two cases of personal injury to railway mail clerks have been before this court, but in the manner in which the cases were brought before this court, no construction was given to R. S., Sec. 4000.

Gleeson v. Virginia Midland Ry. Co., (140 U. S. 435; 35 Law 459,) was brought for a personal injury to a railway mail clerk. The Railway Company's line ran through the District of Columbia and the State of Virginia; on what

part of the line the accident occurred is not stated. On the trial the railway mail clerk was given the status of a passenger. The verdict was for the defendant which was affirmed by the Supreme Court of the District of Columbia.

The case was brought to this court in error and reversed because the trial court had refused to instruct to the effect "that the happening of an injurious accident is, in "passenger cases, prima facie evidence of negligence on "the part of the carrier." Plaintiff in error could not complain of the ruling of the lower court giving him the rights of a passenger, as this ruling was in his favor, and could not be objected to by him.

140 *U. S.* 444-445, (35 *Law* 463); *Gleeson v. Virginia Midland Ry. Co.* (1890.)

DIVISION VI.

LIABILITY FOR FAILURE TO PERFORM A STATUTORY DUTY.

The authorities cited in the preceding division of this brief are also authorities upon the proposition that one failing to perform a duty imposed by law, is liable for damages caused to a third person, arising from such failure.

In a personal injury case decided in 1852, this court said: "The liability of the defendants below, for the negligent and injurious act of their servant, is not necessarily "founded on any contract or privity between the parties, "nor affected by any relation, social or otherwise, which "they bore to each other." * "This duty does not result "alone from the consideration paid for the service. It is "imposed by the law, even where the service is gratuitous." (p. 485; 14 L. 509.)

55 *U. S.* (14 *How.* 485, (14 *Law* 509); *Philadelphia R'y. Co. v. Derby.* (1852).

The same principle is maintained in:

57 *U. S.* (16 *How.*) 469, (14 *L.* 1019); *Steamboat New World v. King.* (1853).

84 *U. S.* (17 *Wall*) 357, (21 *Law* 627); *New York R'd Co. v. Lockwood.* (1873).

95 *U. S.* (5 *Otto*) 655, (24 *L.* 535); *Grand Tr. R'y. Co. v. Stevens.* (1878).

We have already called attention to the holding of the New York Court of Appeals in the '*Seybolt*' case, and of other courts citing its opinion with approval, to the effect that the carrying of the mail is an absolute ministerial duty.

We do not deem it necessary to pursue this subject further, as it seems to us clear the duty of a railway company to carry and care for the mail is an absolute ministerial duty.

DIVISION VII.

NEGLIGENCE OF THE RAILWAY COMPANY ITSELF.

Facts Alleged: The negligence of the railway company itself charged in the complaint, is as follows:

1. It failed to furnish any suitable or safe room, place or receptacle in which the mail could be safely or securely kept, under lock or key or other secure fastening, but kept the same in a room not designed for or capable of safely keeping valuable articles or property.

2. It made no provision for the safe keeping of said mail-pouch, in case of the absence from its depot of its night station agent, either in the company's business or on his own affairs, or in case its said night station agent was asleep in the depot.

3. It placed the mail-pouch in charge of its night station agent, who was required to attend to his ordinary duiies as a railroad employee, besides taking care of the mail, and failed to place and keep in charge of said mail a competent and vigilant employee.

4. It failed to safely care for and guard said mail-sack and its contents during the night, and to safely deliver the same to the postmistress at the postoffice at said town of Harvey, North Dakota.

Even if the railway company is held to be a public agent and entitled to exemption from liability for the misconduct of its employees the same as a public officer enjoys, it is certain the railroad company is liable for its own negligence.

Postal Regulation, Secs. 713 and 1023, contains three distinct requirements to be performed by the railway company at the intermediate stations therein referred to:

1. To receive the mail from the train for the purpose of making a delivery thereof.

2. To provide a safe apartment or room therefor and keep the mail safely while in its custody.

3. To make such delivery of the mail into the postoffice.

This requires proper care by the railway company of the contents of the mail-pouch, so that *the pouch and its*

contents, as received by the railway company, shall be delivered safely "into the postoffice."

The law makes this the duty of the defendant in error, and not of its mere private employee.

Concerning delivery of the mail, it was said in an early case:

"Now *delivery, ex vi termini*, implies a delivery to a "person, not a mere bringing to a place. unless by some "qualification of the phrase, nor does a mere abandonment "or quitting possession of the letter, amount to the idea of delivery." (p. 907.)

3 *Wils.* 443, (2 *Blackstone R.* 906); *Rowning v. Goodchild.* (1773).

5 *Am. & En. Enc. of Law*, (2nd Ed.) 268; *Title*, "*Carrier of Goods.*" (x-1—c—4).

When a carrier is *required by law or special contract* to deliver goods at a particular place its liability as a carrier continues until the goods have been delivered at that place.

69 *Ill.* 285; *Chicago R. Co. v. Sawyer.* (1893.)

49 *Ill.* 33; *Vincent v. Chicago Ry. Co.* (1868.)

3 *Mich.* 23; *Moore v. Chicago Ry. Co.* (1852.)

It is certainly the spirit of the law that mail shall receive affirmative diligence in its care, custody and delivery.

It is a well settled rule that a railway company, as a carrier, is bound to furnish sufficient means and facilities for the reasonably safe keeping and prompt transportation of property to be carried and cared for by it.

The railroad company must be held to have known the condition of its own depot, what preparation it had made for the safe care of a mail sack in its possession in the way of appliances for its safe keeping, and the person placed to take charge thereof, and the double character of the duties imposed upon its employee in his general work for the company and in the care of the mail sack.

Mr. Thompson says: "It is a general principle in the "law of negligence that where there is a *duty of finding out "and knowing*, that is a duty of *inspection or inquiry, negli-"gent ignorance* in the intendment of the law, is equivalent to *actual knowledge.*"

1 *Thompson's Commentaries on the Law of Negligence*, (1901); *p.* 9, *Sec. 8.*

The complaint alleges that the mail sack was placed on the floor or hung on the wall of a room in the depot, which said room was not designed for or capable of safely

keeping valuable articles or property. That no room box or safe receptacle was provided so that the mail sack could be locked up by lock and key or other secure fastening, and safely kept from the time it was received about 11 o'clock P. M. until delivered "into the postoffice" on the following morning.

Also, that an ordinary unsworn employee of defendant, its night operator Magson, was placed in charge of the mail-sack, but Magson had his usual duties to perform for the company besides looking after the mail-pouch. When, for any reason Magson was out of that room in the depot, whether on the company's business or on his own affairs, or in case Magson was asleep, the mail-pouch was without any protection whatever.

These contingences were so highly probable that reasonable care and prudence and postal regulations required the railroad company to furnish a strong box, cupboard or room where the mail sack could be kept under lock and key, which could be done at small expense, so that any third person gaining access to this room in the depot, lawfully or unlawfully, would not have found the mail sack lying around or hanging up without any protection whatever.

It is suggested by the Circuit Court of Appeals that Magson himself, under the allegations of the complaint, quoted in their opinion, might have stolen the package and money therein contained. This suggestion is due to the fact that parts of the complaint bearing upon the question have been overlooked.

Besides the clause quoted in the opinion the complaint alleges, in substance, that one Soule had no right of access to the room where said mail sack was kept or to the said mail sack; that said Soule had forged a key to said mail sack, and personally or with the aid and assistance of some person or persons to this plaintiff unknown did enter the room where said mail sack was kept.

The complaint further alleges: "That by reason of "defendant's said negligence, some person to this plaintiff "unknown, in some manner not known to this plaintiff, ob-"tained access to said mail sack and opened the same and "abstracted or took therefrom said registered package "whereby the same was wholly lost to said German State "Bank. That said Soule had previously unlawfully obtain-"ed and caused to be made, a key to the United States "Government mail sacks or mail pouches, and personally, "or with the aid and assistance of some person or persons,

"to this plaintiff unknown, did enter one of the rooms con-
"tained in the said depot building, where said mail sack or
"mail pouch had been placed by defendant's operator or
"night agent, on the floor or wall of said room, and not in
"any separate room, closet or other safe receptacle. cap-
"able of being securely fastened against any intruder or
"unauthorized person, by lock and key or otherwise. That
"said room was not designed for or capable of safely keep-
"ing valuable articles or property." (Trans. p. 35.)

Also: "That *said Soule, or other person*, had no right or
"access to said room, or to said mail-sack or mail-pouch
"but *through the negligence of defendant and its said night*
"*operator or night agent as set forth in this complaint, did*
"*gain entrance to said room and obtain access to said mail-*
"*sack or mail-pouch, and the mail matter therein contained*,
"and did find said mail-sack or mail-pouch situated or
"placed as above set forth, so that the same was readily
"accessible to any person gaining entrance to said room,
"*and did find said mail-sack or mail-pouch wholly unprotected*
"*and unguarded by said night operator or otherwise.*" (Trans.
35 and 36.)

Also: "That *said Soule, or other person, by reason of the*
"*aforesaid negligence of said defendant and its said night sta-*
"*tion agent or night operator, did obtain access to said mail-*
"*sack or mail-pouch and did unlock the same and abstract and*
"*take therefrom the aforesaid registered package*, containing
"said three thousand dollars ($3,000.00) in currency and did
"unlawfully convert the same to his use and benefit and the
"same has never been delivered or returned to said German
"State Bank or to said Metropolitan Bank of Minneapolis,
"or to this plaintiff, the Bankers Mutual Casualty company,
"or to any one for the benefit of any of them." (Trans.
p. 36).

The complaint distinctly alleges that the taking of said registered letter and currency was done by Soule or some other person through the negligence of Magson and the railway company. That Magson and the railway company were only concerned in the abstraction of said package of currency, through their negligence, thus affording the opportunity for Soule or some other person to gain access to said mail-sack, to open it and to steal the package therefrom.

Common Carriers: We have not the slightest doubt of the constitutional power of Congress to impose upon a person, natural or artificial, undertaking to carry the mail and while so engaged, the same liability as a common car-

rier has, and this is especially true when the person untaking the carriage of the mail, is an artificial being, a creature of the law, already engaged in the business of a common carrier of property and passengers, it would be simply adding another species of property to be transported upon the same terms as all other property is carried by it.

No citizen of the United States or corporation organized under the law of any state can evade or escape from the constitution and laws of the United States, as well as the constitution and laws of the particular state where it resides, or, if a corporation, under which it was organized. Every railway company must accept its articles of incorporation subject to the Constitution of the United States.

Conceding that the constitutional rights of the person, natural or artificial, must be respected, and that an adequate compensation must be paid for the carriage of the mail, the United States, in time of peace can require and compel the carriage of the mail, troops, artillery, horses, munitions of war and whatever else may be required to be carried under the various powers conferred upon Congress.

A natural person in time of peace, may be required to be enrolled in the militia and to perform such active services as are necessary to render the militia efficient. Such person may also be required to serve as a juror of the United States.

We believe that the United States has power to compel the service of its citizens, in the army and navy of the United States, in time of peace, so that other constitutional rights of the citizens are duly preserved. We feel certain that this power exists in time of war.

The exercise of these powers is a questions of legislative discretion, rather than one of the existence of the power itself.

In the case at bar the railroad company has undertaken to carry the mail on the terms fixed by Congress aud the Postoffice Department. It is not in a position now to question the adequacy of the compensation allowed for the service or dispute the validity of the Postal Laws and Regulations under which it earned the compensation in view when it performed the service. If unwilling to undertake the duty under the terms thereby imposed or if not satisfied with the compensation provided for the service, it ought to have made its objection thereto at the threshold, and before undertaking the carriage of the mail on the terms established

It is true the relation of a common carries is contractual, the terms being mainly implied by law, as the actual transaction usually consists of the payment of fare and the issuance of a passenger ticket or the payment of freight and the delivery of a receipt therefor, all other terms of the contract being implied by law.

But the same degree of care, as is required of a common carrier, and the same liability for failure to exercise the required degree of care, may be established by law, as to the carriage of the mail. There is no express statute fixing the degree of care, and the real question is as to the degree of care required by the Statutes of the United States, in force at the time in question, which are set forth in this brief.

Compensation: The compensation paid to the carrier of the mail and the person in charge thereof is paid by the United States government. Nothing is paid to the carrier by the owner or sender of the mail. or to the person in charge of the mail. This is true in all the railway mail clerk cases previously cited, in which recovery was had against the railway company.

This subject is considered in the following cases.

79 *Tex.* 371; *Gulf Ry. Co. v. Wilson.* (1893.)

133 *Ind.* 346; *Cleveland Ry. Co. v. Ketchum.* (1891.)

6 S. *Car. Rich.* 130; *Hammond v. North E. Ry.* (1874.)

66 *N. Y.* 313; *Blair v. Erie Ry. Co.* (1876.)

15 *N. Y.* 444; *Nolton v. Western Rd. Corp.* (1857.)

Concerning liability for gratuitous service undertaken, this court said, in the Derby case: "This duty to a passenger does not result alone from the consideration paid "for the service. It is imposed by the law, even where "the service is gratuitous. The confidence induced by "undertaking any service for another is a sufficient legal "consideration to create a duty in the performance of it." (p. 485; Law p. 505.)

55 *U. S.* (14 *How.*) 485., (14 *Law* 502); *Philadelphia R. R. Co. v. Derby.* (1852.)

Conclusions: A railway company carrying the mail is under one of three obligations, (1.) the same as that of a common carrier, or (2.) the same as that of a bailee for hire, or (3) the same as that of one under a statutory obligation to carry safely. In any event, such a railroad company is required to exercise at least ordinary care, and a failure to exercise such care on the part of the railway company is alleged in the complaint.

DIVISION VIII.

NEGLIGENCE OF THE EMPLOYEE OF THE RAILWAY COMPANY.

The negligence charged in the complaint against Magson, the night station agent employed by the defendant in error at Harvey, North Dakota, is, in substance, as follows:

1. Said Magson carelessly and negligently permitted one Soule or some other person to enter the depot while said employee was or ought to have been on duty, as defendant's representative in charge of the mail-sack, and to gain access to and open said mail-sack and take therefrom the registered package in question containing said sum of $3000.00.

2. Said Magson negligently failed to care for said mail-sack and its contents, including the registered package containing said $3000.00, and negligently failed to deliver said mail-sack with its contents, as received by said Magson, to the Postmaster at Harvey, North Dakota.

Much of what has been said in the previous division of this brief on the subject of the negligence of the railway company itself, also applies to its employee Magson.

Our contention is that Magson owed the duty of the affirmative diligence in the care and custody of said mail-sack and its contents while it was in his custody and that he had no right to leave the same at any time, wholly unguarded in the room in the depot where it was kept, as the room was not adapted to the safe keeping of valuable articles or property and had no protection except his vigilance, against persons gaining access to the room, lawfully or unlawfully.

The nature and extent of the rule of respondent superior, is thus stated by this Court, in the "Derby" case, in the opinion written by Mr. Justice Grier:

"The liability of the defendants below (the railroad "company), for the neglect and injurious act of their ser- "vant, is not necessarily founded on any contract or privity "between the parties, nor affected by any relation, social "or otherwise, which they have to each other. It is true, "a traveler by stage coach or other public conveyance, "who is injured by the negligence of the driver, has an ac- "tion against the owner, founded on his contract to carry

"him safely. But the maxim of 'respondeat superior', "which by legal imputation makes the master liable for the "acts of his servant, is wholly irrespective of any contract, "express or implied, or any other relation between the in- "jured party and the master." (pp. 484-485; Law p. 509.)

Also: "The rule of 'respondeat superior', or that the "master shall be civilly liable f the tortious actions of "the servant, is of the universal application. whether the "act be one of omission or commission, whether negligent, "fradulent or deceitful. If it be done in the course of his "employment, the master is liable. and it makes no differ- "ence that the master did not authorize, or even know of "the servant act or negligence, or even if he disapproved "or forbade it he is equally liable, if the act be done in the "in the course of his employment." (p. 486; Law p. 509.)

55 *U. S.* (14 *How.*) 484, (14 *Law* 502); *Philadelphia R. Co. v. Derby.* (1852.).

The rule is thus stated by *Mr. Wood:*

"Sec. 288: When a person puts another in his place to do "certain acts in his absence. he necessarily leaves him to "determine for himself according to his judgment and dis- "cretion, according to circumstances and exigencies that "may arise, when and how the act is to be done, and trusts "him for its proper execution; consequently he (the master) "is answerable for the wrongful execution of the acts either "in the manner or occasion of doing it, provided it is done "boni fide in the prosecution of his business, and within the "scope of the servant's express or implied authority, and "not from mere caprice and wantonness and wholly outside "the duties imposed upon him by the master."

Wood's Law, of Master and servant, Sec 288.

The trial court, in its opinion said he could not hold "that defendant's duty in respect to the mail-sack under "the circumstances required that the station agent should "sit on the mail-sack the balance of the night and keep "awake." (Trans. p. 29).

It cannot be claimed that it was literally necessary for the night operator to actually sit on on the mail-sack, but we cannot and do not concede that, when the only protection furnished by defendant in error for the mail-sack, and valuable packages therein contained was the personal supervision and vigilance of its night operator, defendant could permit such mail-sack to be at any time without his personal supervision, without the defendant in error being negligent. And if the night operator in violation of his duty and instructions left said mail-sack so that it was not

under his personal supervision, then said night operator was negligent, and, if the rule of respondeat superior applies, defendant in error is liable for such negligence in this case.

As was said in the case of *Bolan v. Williamson*, concerning the deputy postmaster, Chapman, "the presumption is therefore that the money must have been taken out of the letter by some one who had access to the office before the mail was closed and although there is not any imputation against Chapman's honesty yet by his negligence it might have been lost or taken out by dishonest persons who got admission by some means into the post-office." (p, 554.)

2 *Bay* (*S. C.*) 551; *Bolan v. Williamson.* (1804.)

It is admitted by the demurrer that the mail-sack contained the registered package in question, when said mail-sack was delivered to defendant's night operator at Harvey, that the mail-sack was opened by some person with a false key in a room in the depot belonging to defendant in error, in which said mail-sack had been placed by said night operator, and that said room was not designed for safely keeping valuable articles or property.

If the mail-sack had been in the same room with the night operator and under his continuous supervision the loss of the registered package in question would have been impossible, and such loss is therefore attributable to the negligent failure of said night operator to naintain an adequate watch over or supervision thereof.

Reasonable care and vigilance on the part of the night operator would have prevented the robbery of this package, notwithstanding the fact that the defendant in error had failed to furnish any adequate and safe place in which to keep said mail-sack under lock and key or other secure fastening.

"If there was evidence tending to show that the defendant was thus negligent in more ways than one, it was not incumbent upon the plaintiff to satisfy the jury of the one particular act of negligence which led to the loss, or to show who got the money. It was sufficient that the jury was reasonably satisfied that the defendant did not exercise that care and prudence in the discharge of his duties in regard to the letters as a reasonable and prudent man would in regard to his own business, and that such neglect was the cause of the loss or injury."

97 *Ala.* 710; *Raisler v. Oliver.* (1893.)

It is certainly not necessary to allege that which need not be proven on the trial.

DIVISION IX.

IS DEFENDANT IN ERROR EXEMPT FROM THE RULE OF RESPONDEAT SUPERIOR?

The precise questions for determination in this case have not been decided by this or any other Federal Court, prior to this case, so far as counsel have discovered.

At the outset, we concede that Congress has the fullest and most ample authority to select the means of carrying out the powers conferred upon it by the Constitution and to prevent any interference with the execution of those powers and the means, instrumentality or agency employed by the government to effectuate them, including any interference with or obstruction to the person, natural or artificial, designated or selected in accordance with law for that purpose and without regard to the nature of the relation of such person to the government.

We deem it proper to state at the commencement that defendant in error is a State corporation carrying the mail upon notification from the Second Assistant Postmaster General, and that defendant in error was not created as a corporation by Act of Congress, nor had it any Federal franchise nor did it receive any aid or subsidy from Congress.

The court below does not deny and we presume this court will hold as a matter of course that being a public officer or public agent will not relieve defendant in error from responsibility for the acts or negligence of its own private agent or employee to whom it entrusts the performance of a public duty which by law or contract it is bound to perform. The defendant in error is liable if Magson was the private agent or employee in handling the mail as provided by Sec. 713, Postal Regulations Ed. 1893. Defendant in error at the most can be relieved only when Magson is held to be a public officer or agent.

The Circuit Court of Appeals, as its sole ground of decision in this case, and the trial Circuit Court as one of the grounds of its decision, **held that defendant in error, when carrying the mail, was a principal public agent of the United States, and that Magson, the night agent, an ordinary unsworn employee of defendant in error, when in charge of the mail, was a subordinate public**

agent or employee of the United States; and that such principal public agent was exempt from liability for the default, negligence or misfeasance of its said subordinate while so engaged, and in this respect had the same exemption as a principal public officer of the United States.

Under the facts of this case we claim that these decisions are erroneous in holding that either the railway company or its employee or either of them when caring for the mail are public agents of the United States, and in holding that a principal public agent other than a public officer, or that one performing a statutory duty under acts of Congress, are either of them exempt from liability under the rule of respondeat superior, because this exemption exists only under the following conditions.

First: When a public officer or agent, under duty bound to perform a public service, causes or permits such service to be performed in fact by the hand of his own private employee or servant, he is responsidble for the acts or omissions of that private employee under the rule of respondeat superior.

Second: To entitle a principal public officer or agent to exemption from liability under the rule of respondeat superior, such principal public officer or agent, and his subordinate in the public service must each be known to and derive his appointment from the law. Each must be in the employ of the government. A railway company carrying the mail is not appointed or elected under any law. If the designation of a railway company to carry the mail, by law and by the notification of the Second Assistant Postmaster General, be held equivalent to an appointment, nevertheless its ordinary employees are its mere private servants, employed, directed and discharged at its will, without any power or authority of any officer of the United States to employ, direct or discharge them. Such employees are not agents or employees of the United States, in any sense whatever.

Third: Such principal public officer or agent and his subordinate in the public service must each be qualified as provided by law. The demurrer in this case admits that neither the railway company nor its night station agent, Magson, was sworn into the postal service. The railway company, as a mere legal entity was incapable of being sworn, and there is no provision for a substituted oath to be imputed to a railway company carrying the mail. The statutes intend that the postal oath is not to be administered to a railway company before performing

its duties in the carriage of the mail. The statutes also intend and Postal Regulation, Sec. 713, Ed. 1893, expressly states that a railway employee performing the service in question "need not be sworn as employees of such service" and "are agents of the companies and not employees of "the postal service." The postal oath is required to be administered to "all persons employed in the postal serv-"ice." If not in the postal service, of course neither employer or employee need take the postal oath.

Fourth: The compensation of such principal public officer or agent and of his subordinate in the public service must as to each be authorized or provided for by law, whether in the form of salary paid or fees collected; the amount and time of payment being fixed by law. If it be held that the compensation of a railway company for such services is fixed by law and the orders of the Postoffice Department, yet the wages of an ordinary unsworn employee of a railway company caring for the mail, are fixed by the railway company, or by contract between such company and its employee, and are not fixed by law. Such wages are paid from the ordinary revenues of the company.

Fifth. Public officers or agents, principal and subordinate, must, while performing services for the government, be exclusively engaged in such public service. A governmental agency which combines its private welfare or advantage with the performance of its governmental functions is subject to the rule of respondeat superior. A railway company ordinarily carries mail on the same train with passengers, express and baggage, and a railway company and its ordinary employees concerned in the operation of such train, are working at all times for the pecuniary profit and benefit of such company, and any advantage derived by or service performed for the public, is merely incidental to and a part of its main business, as a corporation for pecuniary profit.

Sixth. Exemption from liability under the rule of respondent superior does not depend alone upon the performance of a governmental function or of a service for benefit of the public, but upon the relation to the government of those, both principal and subordinate, entrusted with the performance of such duty or service together with the governmental nature of the duty or service in which such persons are exclusively engaged while acting for the government.

Seventh. Exemption from the rule of respondeat su-

perior is limited to the performance of those superior functions of the government which are entrusted to public officers. Other public agents of the government, and those otherwise performing statutory duties for the government, do not have this exemption, unless it is conferred upon them by legislative enactment, and there is no such enactment as to railway companies carrying the mail.

The subordinate being the private employee of the public officer, and not a subordinate public officer or agent, whose appointment is known to the law.

A public officer must be "known to the law;" whether a principal or subordinate officer, his appointment or election must be authorized by law, and the same must certainly be true as to any one claiming to be a public agent or public employee. The exemption in question is not given to the principal officer or agent unless his subordinate is also a public officer or agent.

In the Connecticut case of *Ely vs. Parsons*, defendant was a select man having charge of certain highways. He employed one Button to cut down trees and brush obstructing a highway. Button wrongfully cut certain trees, etc., on plaintiff's land, which were not obstructing the highway. Plaintiff sued for damages on this ground, and recovered. The Supreme Court held that Parsons was a public officer, but that Button "did not hold an office known to the law." That court also said: "We do not think that Button should be regarded as an inferior public officer or agent but rather was acting solely under the "defendant." Parsons was, therefore, held not exempt from liability, under the rule of respondeat superior, and the judgment was affirmed.

55 Conn. 83; Ely vs. Parsons (1887).

In the Alabama case of *Raisler vs. Oliver* (97 Ala. 710), the opinion says: "The exemption from liability of the postmaster for the "defaults and misfeasance of his clerks "and subassistants is available to the postmaster only in "cases where such clerks or subassistants are appointed in "pursuance of some law expressly authorizing it, so that, "by virtue of the law and the appointment, the appointees "become, in some sort, public officers themselves."

Also, **"A postmaster who employes a clerk or assistant, inde-"pendent of express authority, and who is paid out of his own salary or "means, is liable for the default or misfeasance of his clerk or assist-"ant, as any private person would be for the acts of his agent or em-"ployee. The doctrine of respondeat superior applies in such cases."**

97 Ala. 710; Raiser vs. Oliver (1893).

Mr. Minot, in the extract previously quoted, says: "On "the other hand if the subordinate be not a government "officer, but the superior's private servant, the maxim of "respondeat superior applies and the master is responsible "for his acts and defaults."

1 Minot's Institutes (2d ed.) p. 228; (3d ed.) p. 253.

Postal Regulations No. 713, quoted in division three (3) hereof requires railway companies to receive and deliver mail, at the classes of stations in question "at which *the "company has an agent or other representative employed.*"

This regulation clearly contemplates that the company is to act through its own agent or representative who is and continues to be an employee of the company. There is not the slightest suggestion that the agents and representatives of the company, thereby become agents or employees of the government. So as to prevent any misunderstanding on this point the regulation says that "the persons "employed by the railroad companies to perform such ser- "vice are agents of the companies and not employees of the "postal service, and need not be sworn as employees of "such service."

The law and this regulation are clearly framed so that the company shall perform these services for a designated compensation and shall use its own private employees in performing the services.

Mr. Thompson says: "The right to control the conduct "of another implies the power to *discharge* him from the "service or employment for disobedience; and, accordingly, "the *power to discharge* has been regarded as the test by "which to determine whether the relation of master and "servant exists."

Thompson's Comm. on Law of Negligence (1901 Ed.); p. 535, Sec. 579.

Magson was employed and subject to be discharged by and was under the exclusive control of the railway company. The government did not employ him. Magson was the mere private employee of defendant in error, and as to such private employee defendant in error was subject to the rule of respondeat superior.

Exemption of Public Officers from Respondeat Superior: It is settled law that a principal public officer is not liable for the default, negligence or misfeasance of his subordinate public officer or agent employed exclusively in the public service.

But such principal public officer is liable for his own personal default, negligence or misfeasance, which includes acts done by himself or by his direction, the appointment of proper subordinates, diligent supervision of his subordinates, the removal of incompetent subordinates, and furnishing proper appliances when it is his duty to furnish them.

2 *Cowper's R.* 754; *Whitfield v. Lord de le Spencer.* (1778.)

1 *Ld. Raymond's R.* 656; *Lane v. Cotton.* (1701.)

7 *Cranch* (*U. S.*) 241, (3 *Law* 329); *Dunlop v. Munroe.* (1812.)

12 *How.* 284, (13 *Law* 990); *Teal v. Felton.* (1851.)

127 *U. S.* 507, (32 *Law* 203); *Robertson v. Sichel.* (1887.)

184 *U. S.* 676, (46 *Law* 754); *Howord v. U. S.* (1902.)

2 *Blatch* (*U. S.*) 121; *Brissac v. Lawrence.* (1850.)

15 *East* 189; *Nicholson v. Mounsey.* (1812.)

10 *W. Va.* 19; *Tracy v. Lloyd.* (1877.)

We refer also to other cases cited in this and the following division of this brief.

The Qualifications of Public Officers and Agents: Concerning the qualification of public officers and agents, in the manner required by law, there are decisions upon the effect of a failure to take the postal oath. The act in force on that subject at the time effecting this case is set out in the third division of this brief. The demurrer admits that neither the defendant in error nor its employee, Magson, was sworn into the postal service. The Circuit Court and Circuit Court of Appeals held that this fact was immaterial.

On the other hand, in *Dunlap vs. Munroe*, this court said: "Now the distinction between the relation of a post-"master to *his own sworn assistant* acting under him, and be-"tween master and servant generally, has long been set-tled." (p. 269; Law p. 339). This evidently referred to the English cases of *Whitfield vs. De Spencer* and *Lane vs. Cotton*, cited supra, which were referred to in the briefs of counsel.

7 Cranch (*U. S.*) *268*, (*3 Law 329*); *Dunlop vs. Munroe* (*1812*).

In a Maine case it was said:

"Cargill not being under oath was wrongfully in care "of the office and the defendant knew it; he cannot, there-"fore, bring himself within the protection of legal princi-

"ples, nor avoid the influences of the maxim, that every man must draw his justice from pure fountains."

11 Me. (Fairfield) 495; Bishop vs. Williamson (1834).

In a Vermont case the opinion said: "But it does not "appear that any of these persons were appointed and "sworn as the defendant's assistants." (pp. 673; 675). The postmaster, defendant Smith, was therefore held liable for the negligence of his unsworn assistants.

23 Vermont 663; Christy vs. Smith. (1851).

In *Sawyer vs. Corse* the employee, Fleming, "took no "oath while in the employment of defendant." (p. 233).

The Virginia Supreme Court said: "But if a carrier "who has taken the oath required by the act of Congress "can be justly regarded as an agent and servant of the gov- "ernment and no longer the mere agent and servant of the "contractor. *A "carrier who has not taken the oath cannot "be so regarded, because the act requires that he shall take the "oath before he enters upon his duties.*" "As Fleming had "not taken the oath to perform his duties under Sawyer, "therefore it is not competent for Sawyer to shield himself "by alleging that Fleming was an agent and servant of the "government, and especially as it was a breach of duty in "him to allow a person who had not been sworn to carry "the mail. Act March 3, 1825. (p. 244)."

17 Gratt (Va.) 230; Sawyer vs. Corse. (1867).

In *Central R. and B. Co. vs. Lampley* there was no carrier or postal clerk on the train (p. 360); the conductor (p. 360) nor any other of the railroad company's employees was sworn as a postal official (p. 361), and the rule of the Virginia case above cited was followed. The extract previously quoted from this decision clearly recognizes the distinction between an ordinary unsworn employee of a railway company, engaged in his employer's ordinary business, while incidentally performing services in relation to the mail, on the one hand, and a duly sworn subordinate public agent or employee of the United States, on the other hand.

76 Ala. 366; Central R. R. & Bkg. Co. vs. Lampley (1884.)

See also:

35 Maine 586; Rounds vs. Mansfield. (1854).

15 L. R. A. (Mich.) 97; Trainor vs. Bd. of County Auditors. (1891).

As the United States statutes do not requre a railway company or its employees, or any of them, to be sworn,

when engaged in the transportation, care or custody of the mail, while all postal officials are required to be so sworn, this is strong ground for believing they were not intended to be public agents of the United States, as all of its public officers, agents and employees engaged in that service, are required to take an oath before entering upon the discharge of their duties. As neither did take such oath they have no right to claim to be duly qualified public agents.

Must be exclusively engaged in the public service: It is only one who is exclusively engaged in the performance of a public function while acting for the government or performing a service of benefit to the public, who is a public agent so as to be entitled to exemption from the rule of respondeat superior. Not that his entire time is to be devoted to the public service, but that while purporting to perform public functions he must then act solely and exclusively for the public benefit without profit or advantage to himself to be derived from the act performed, other than the salary or fees allowed by law.

The case of *Sawyer v. Corse*, (17 Gratt. 230), was an action against a mail contractor for the loss by its employee of a registered package. The effect of combining the ordinary business of a common carrier with its services rendered in the care and carriage of the mail was considered. The Supreme Court of Virginia said:

"But it has been held that where the authority, though "for the accomplishment of objects of a public nature and "for the benefit of the public, is one from the exercise of "which the corporation derives a profit, and where the "duty though of a public nature and for the public benefit "may fairly be presumed to have been enjoined upon the "corporation in consideration of privileges granted to and "accepted by it, the exemption does not apply. And the "reason is that, in such cases, the corporation is not act-"ing merely as an agent of the public and with a view "solely to the public benefit, but that in the former it is "pursuing its own interest and profit, and in the latter is "executing a contract for which it has received a consider-"ation" Citing cases. (p. 241.)

16 *Gratt.* (*Va.*) 230; *Sawyer v. Corse.* (1867.)

The Supreme Court of Alabama accepts and concurs in the principles enunciated in *Sawyer v. Corse.* Concerning a railway company and its ordinary employees, both engaged in the usual business of said company, while performing services in relation to the mail that court said:

"The regular and usual business of the defendant was "a carrier of passengers and goods. Its railroad was, by "law, an established post road; and *by direction of the Post-"office Department*, was carrying the mails between Eufaula "and Clayton. The agents and servants of the trains were "not employed for the special business of transporting the "mails. They were employed in the general business of "transportation, and under said employment, were used in "the incidental service of carrying the mail matter. Being "thus generally engaged, and rendering such general "service, as the private agents and servants of the defend-"ant, the incidental service in carrying the mails does not "impart to them the charanter of public agents and "servants." (p. 366.)

76 *Ala.* 337; *Central R. R. & Bkg. Co. v. Lampley.* (1884.)

The same rule is announced as to a city combining private advantage with the performance of its public functions.

In the *Croton dam* case, entitled *Bailey v. Mayor, etc., of New York*, (3 Hill 631,) plaintiff sued for damages to his property caused by the unskillful erection by defendant city, of a dam 150 feet beyond the usual ordinary height of the water in the Croton river, which dam was destroyed by said water, and great damage was thereby done to plaintiff's property adjacent thereto.

Plaintiff offered to prove that the dam was negligently unskillfully and carelessly constructed, which was excluded by the trial court. (p. 535.) Plaintiff was nonsuited and moved for a new trial on a bill of exceptions. (p. 535.) Reversed.

The water commissioners having charge of the work were not appointed by the defendants but by the State, and it was contended they were not agents of defendants; that their functions were governmental, and, that the principle of respondeat superior did not apply. After an examination of the Session Law of 1834, p. 451, the Supreme Court held that: "by accepting the charter, the de-"fendants thereby adopted the commissioners as their own "agents to carry on the work. The acceptance was entirely "voluntary." (p. 543.)

The court further held that: "The powers conferred by "the several acts of the legislature authorizing the execu-"tion of this great work *were not, strictly and legally speak-"ing, conferred, for the benefit of the public. The grant is a "special, private franchise, made as well for the private emolu-*

"*ment and advantage of the city, as for the public good.* The "state in its sovereign character has no interest in it. It "owned no part of the work." (p. 539).

After considering a blending of powers granted exclussively for a public purpose with those powers conferred upon the corporation for private advantage and emolument, and holding that the distinction is quite clear and well settled, and the process of separation practicable (p. 539), the court said:

"But if the grant was for the purpose of private advan- "tage and emolument, though the public may derive a com- "mon benefit therefrom, the corporation *quoad hoc*, is to be "regarded as a private company. It stands upon the same "footing as would any individual or body of persons upon "whom the like special franchise had been conferred." (p. 539).

The Court recognized the rule that if the commissioners had been acting solely for the state, even if they were defendants' agents, then defendants would not be responsible for the conduct of those necessarily employed by the commissioners, if they were not chargeable with any want of diligence in the selection of agents. "They (defendants) "would then be entitled to all the immunites of public offi- "cers, charged with a duty, which, from its nature, could "not be executed without availing themselves of the ser- "vice of others, and the doctrine of respondeat superior does not apply to such cases." (p. 538).

3 Hill (N. Y.) 631; Bailey vs. Mayor and City of New York. (1842.)

The same case was subsequently before the Court of Appeals under the title of *Mayor, etc., of New York vs. Bailey*, (2 Denio 433) a verdict for over $62,000 having been rendered in favor of plaintiff on a retrial of the case. The learned Chief Justice could not agree that the commissioners in charge of the erection of the erection of the dam, under appointment by the State, were agents of the city, and concurred in an affirmance on other grounds; nevertheless the Senator who, as a member of that court, wrote one of the majority opinions, distintly asserted the doctrine above stated as one of his grounds of affirmance. The reasons for affirmance held by the other members, constituting a majority of the court, are not stated.

2 *Denio* 433; *Mayor and City of New York v. Bailey.* (1845.)

The same doctrine was subsequently announced by that court in *New York L. & S. M. Co. v. City of Brooklyn*, (71 N. Y. 580,) decided in 1878, wherein the Court of Appeals held that: "A municipal corportion is held liable for "the acts of an agent it employs to do business for its own "corporate or private benefit, the same as a private in- "dividual, and this, although the agent may be appointed "by the legislature or under legislative authority, if it ac- "cepts and ratifies the appointment." (p. 584.)

71 *N. Y.* 480; *N. Y. L. & S. M. v. City of Brooklyn.* (1878.)

To the same effect see:

17 *Gratt* (*Va.*) 375; *Richmond v. Levy.* (1867.)

The general rule in relation to muncipal corporation is stated in the *Am. & Eng. Enc. of Law*, thus: "But where "the act of its officers is committed in the performance of "some municipal or corporate duty which is private in its "nature, the corporation is liable."

19 *Am. & Eng. Enc. of Law*, (1*st ed.*) 514; title, "Public Officers," says: "persons acting for their own benefit, or "employing others for their own benefit," are not entitled to the exemption in question.

Story on Agency (9*th ed.*); *sec.* 321.

The liability of defendant as a principal, under the rule of respondeat superiar in the railway mail clerk cases, and the cases of injuries by mail-sacks could be sustained on this principle, that the railway company was not exclusively employed in the public service, but was transacting its ordinary business for its private advantage, as well as carrying the mail and was therefore a principal as to its employees and liable as such, but was not exempt as an intermediate or principal agent.

National and state sovereignties engaging in the banking business, by becoming the owners of capital stock or shares in banking corporations, lose their immunity from suit, in relation to the affairs of such bank. On this subject, speaking by *Mr. Chief Justice Marshall*, this court said:

"It is, we think, a sound principle, that when a Govern- "ment becomes a partner in a trading company, it *devests* "*itself*, so far as concerns the transactions of the company, "*of its sovereign character, and takes that of a private citizen.* "Instead of communicating to the company its privileges "and prerogatives, it descends to a level with those with

"whom it associates itself, and takes the character which "belongs to its associates, and to the business which is to "be transacted. Thus, many states in this Union who have "an interest in banks, are not suable even in their own "courts; yet they never exempt the corporation from being "sued. The State of Georgia, by giving to the bank the ca- "pacity to sue and be sued, voluntarily strips itself of its "sovereign character, so far as respects the transaction of "the bank, and waives all the privileges of that character. "As a member of a corporation, a government never exer- "cises its sovereignty. It merely acts as a corporator, and "exercises no other power in the management of the affairs "of the corporation, than are expressly given by the incor- "ating act."

"The Government of the Union held shares in the old "bank of the United States; but the priviliges of the govern- "ment were not imparted by that circumstance to the bank. "The United Statks was not a party to suits brought by or "against the bank in the sense of the constitution. So "with respect to the present bank. Suits brought by or "against it are not understood to be brought by or against "the United States. The government, by becoming a cor- "porator. lays down its sovereignty, so far as respects the "transactions of the corporation, and exercises no power "or privilege which is not derived from the charter."

22 *U. S.* (9 *Wheat.*) 904, (6 *Law* 244): *Bank of the U. S. v. Planters Bank.* (1824)

The foregoing decision must be considered in connection with the prior holding of this court that the power to organize a banking corporation was a means Congress might adopt for carrying out the the powers confered upon the Congress.

4 *Wheat*, 400, (4 *Law* 600): *McCulloch v. State of Marytand*, (1819).

In *Cooke v. United States*, (91 U. S. 1 Otto 389), this court said:

"Still a government may suffer loss through the negli- "gence of its officers. If it comes down from its position "of sovereignty, and enters the domain of commerce, it sub- "mits itself to the same laws that govern individuals there. (p. 398, Law p. 243).

91 *U. S.* (1 *Otto*) 389, (23 *Law* 243); *Cooke v. U. S.* (1875).

It appears to us that these decisions could also be sustained on the ground that the government is combining

private business with its governmental functions, and in such cases is liable so far as relates to the business of the banking corporation the same as any other person transacting like private business *in connection with* the performance of services of benefit to the government or the public.

It is therefore clear that a public officer has no *immunity* or exemption from any suit founded upon his liability as a principal for his own misconduct nor for the acts or omissions of his private agents or employees under the rule of respondeat superior.

The case of *Mersey Docks v. Gibbs*, decided in 1866, as we understand it, established two other important propositions on the subject of public agency:

First: That exemption from liability under the rule of respondeat superior, is one which pertains only to public officers and that the trustees organized as a corporate body considered in that case, were not public officers in that sense, and therefore not entitled to the exemption in question.

Second: That this particular exemption from liability does not exist in favor of persons, other than public officers, performing services of benefit to the government, unless granted by legislative enactment, and that the Acts of Parliament under consideration. did not grant such exemption, and therefore the liability of the trustees as a principal under the rule of respondeat superior, was in full force in that case.

In the *Mersey Docks* case the form of organization, powers and duties arose and was continued under Acts of Parliament, with power to sue and be sued.

A ship belonging to defendant in error was damaged by running aground on a bank of mud in the docks, where the channel had not been kept clear, because of the fault of a subordinate, the harbor master charged with that duty. Defendant in error, Gibbs, sued the trustees of the docks for damages resulting from said grounding of his ship, and recovered judgment. Affirmed.

The House of Lords held (10 & 11 Vict c. 27, Act 1847. pp. 525-6; pp. 704-5),

The true rule of construction is said to be: "*That the legislature intended* that the liability of corporations thus "substituted for individuals should, to the extent of their "corporate funds, be coextensive with that imposed by the general law on the owners on similar works." (p. 527 p. 706.)

"And we cannot think that it was *the intention of the "legislature* to deprive a ship owner who pays dues to a "wealthy trading company, such as the St. Catharine Dock "Company. for instance, of all recourse against it, and to "substitute the personal liability of a harbor master, no "doubt a respectable person, in his way, but whose means, "generally speaking, would not be equal to more than a very "small percentage of the damages, where there are any." (p. 539: p. 724).

"We agree with the Court below in thinking that since "the case of *Gibbs v. the Mersey Docks*, we must hold the "funds of this corporation (though established for public "purposes) liable to make good the damages sustained by a "private person from any breach of duty on their part, and "that *there is nothing in the Statutes to exempt this corpora-"tion from the duties which the common laws would cast upon "a private person or trading corporation.*"

43 *L. J. (Exch. App.)* 172; *Winch v. Thamee Conservators.* (1874.)

So in *Hall v. Smith*, decided in 1824, it was said: "The "maxim of respondeat superior is bottomed on this prin-"ciple, *that he who expects to derive advantage from an act, "which is done by another for him, must answer for any in-"jury which a third person may sustain from it.*"

Cases refusing the exemption to mail contractors: The decisions of State Courts on the subject of respondeat superior, as applied to mail contractors or railway companies carrying the mail are conflicting. Those refusing the exemption from this rule are:

17 *Gratt (Va.)* 230; *Sawyer v. Corse.* (1867.)

76 *Ala.* 357; *Central R. R. & B. Co. vs. Lampley* (1884.)

We have occasion to call further attention to these cases in a subsequent part of this division of our brief, and will make no further reference to them here.

Three decisions of State Courts granting this exemption to mail contractors are subsequently considered in this division of our brief.

Text writers: The subject of exemption from liability, under the rule of respondeat superior, of commissioners and trustees is considered in;

Shearman & Redfield on Negligence, (*5th ed.* 1898): *Sees.* 326-328.

Concerning the liability of a so called public agent or

of one performing a public duty, other than a public officer for the default, negligence or misfeasance of his subordinate private employees we find the following text book authorities:

Mr. Wharton, after stating the exemption of public officers from liability under the rule of respondeat superior, as above stated, wrote:

"Sec. 550. It has been held that the trusees of public "works (whether controlled by the state or by a corpora- "tion) are not liable for the torts of subalterns, supposing "there be no *culpa in eligendo. But the better opinion is that "such trustees, even though their services be gratuious, are "liable in all cases in which private persons, mutatis mu- "tandis, would be liable.*"

Wharton on Agency, (1876 *ed.*); *p.* 364, *Sec.* 550.

Mr. Minot says: "When the subordinate is himself a "*government officer* (in contradistinction to a *private servant* "of the superior), whether nominated by the superior or "not, the latter is not responsible for the subordinate's "acts or default, such subordinate not being an agent of "his, but of the government. On the other hand, *if the sub- "orditate be not a government officer, but the superior's private "servant*, the maxim of respondeat superier applies and the "master is responsible for his acts and defaults."

1 *Minot's Institutes*, (2*nd ed.*) *p.* 228; (3*d ed.*) *p.* 253.

In the Federal Courts, we have not discovered a single case prior to this action, in which exemption from liability, under the rule of respondeat superior, has been adjudged in favor of a public agent, who was not a "Public Officer". Nor do we find any American case establishing this exemption, except as to one adjudged by the court to be a public officer.

Injuries to railway mail clerks: R. S. Sec. 4000 previously quoted imposes upon railroad companies the duty of carrying the mail and the person in charge thereof. These duties as to the property and person are established by the same statute in identical terms.

In the succeeding division of this brief, (Div. VI), we refer to a number of cases decided by Courts of last resort of different States, holding railroad companies liable for personal injuries caused to railway mail clerks through the default, negligence or misfeasance of the employees of said companies, and in such cases the rule of respondeat superior is applied.

Under an English statute, identical with R. S. Sec. 4000, the railroad company was held liable by the Court of Queen's Bench, sitting in Banc with four Justices, for an injurp to the person of a railway mail clerk, caused by the negligence of the company's employees. The case (*Collect v. London & N. W. Ry. Co.* 30 Law Jour. 411: 16 Q. B. 984. 1851.) is referred to in the succeeding division of this brief; (Div. VI).

We also call attention, in the division of this brief, to cases decided by State Courts of last resort where railroad companies have been held liable under the rule of respondeat superior for injuries to third persons caused by mail sacks, and where, under the same rule, a mail-subcontractor is held liable for an injury to a mail transfer clerk.

The liability, under the rule of respondeat superior, for injuries to a railway mail clerk, announced in the cases above referred to, cannot be sound if a corporation, as a principal public agent, carrying the mail clerk, has the same exemption from liability which a principal public officer enjoys, because a principal public officer is not liable for *any* default, negligence or misfeasance of his subordinate, whether it results injury to the person or property.

It is suggested in the opinion of the learned Circuit Judges, concerning railway mail clerks, that: "As to the "safety of the persons of such clerks the railway company "*assumes the same duty* which rests upon it respecting other persons lawfully being carried on its trains." (Trans p. 28; 113 F. 416.)

This must mean that a railway company carrying the mail, as a principal public agent, has only one-half of the complete exemption from liability, under the rule of respondent superior, which a principal public officer has. It is half liable and half exempt from liability under the rule of respondeat superior; it is liable under the rule, if the injury is to the person; it is exempt from liability under the rule, if the injury is to property. But the exemption is an entirety, and the duty to carry safely both the person and the property arises from the identical terms used as to each in the same statute.

But no case decided by any Court of last resort, that we have discovered, suggests a possible division of this ground of liability, or exemption therefrom. The rule as a whole applies, or the person is wholly exempt from the rule.

The source and nature of the duty to carry the mail

and the mail clerk is the same federal law; the duty is identical—to carry safely. The degree of care required as to persons and property may be, and probably is, different, but all of these matters are of no consequence, if the negligence of the employee, as a matter of law, cannot be charged or imputed to the principal agent, the intermediate agent, who is exempt from the operation of the rule of respondeat superior. The duty at such time is one resting on the employee alone, who performs the act. It is not a question of the duty of the principal agent. but one of his exemption from liability for what another has done or omitted.

While the Circuit Court of Appeals did not specially refer to the law or authorities on the subject of railway mail clerk, their holding is, as we understand it, that a principal public agent stands on exactly the same footing as a principal public officer, and is completely exempted from liability under the rule of respondent superior.

Contractors with the government are subject to the rule of respondeat superior as principles.

1 *Shearman & Redfield on Negligence*, (*5th ed.* 1898); *Sec.* 325, *p.* 557.

110 *Fed.* 545, 550; *Harrison v. Hughes.* (1901).

34 *N. Y.* 389; *Robinson v. Chamberlain.* (1866).

Whatever may be the effect upon the government of entering into a contract, we are not concerned with that here.

The other party to the contract is not an agent of the government, his interests are adversary to the government. His employees are not in the employ of the government. As to such employees the contractor is a principal. There is no question of agency involved; the contractor is not an intermediate agent but a principal: he is not exempt from, but is subject to liability, under the rule of respondeat superior, precisely as if his contract had been made with any other person, or with a corporation, not governmental.

The mere fact that practically all railway companies are carrying mail, and from time to time carry troops, munitions of war and government supplies does not relieve them from liability under the rule of respondeat superior, for damages caused to persons or property, through the default, negligence or misfeasance of their employees, either in the performance of the corporation's duty as a common carrier of freight or passengers, or for injuries to third per-

sons or their property caused by the negligent operation of the railroad, even if the injury is caused by a train carrying the mail. The decisions of this character are numerous.

The general rule as to private corporations owning public works and operating them for a profit, is, that they are liable for torts and are subject to the rule of respondeat superior.

Mr. Jaggard says: "The authorities are generally "agreed that a private corporation owning public works and "operating them for profit, is liable in tort, as any other "corporation, for breach of corporate duty."

I *Jaggard on Torts*, (1895 *ed.*); *p.* 184, *Sec.* 61.

Natural Persons as public agents of the United States: We have found much difficulty in ascertaining what natural persons are really "public agents" of the United States, as distinguished from its "public officers." The word "agent" is used frequently in the Statutes of the United States and in the Regulations of the Executive Departments. Yet, after a deligent and extensive examination, although we can not claim it is exhaustive, we have been unable to find a single instance of a natural person, who is *a principal public agent*, having subordinates under him, as distinguished from a public officer, on the one hand, and a mere clerk or employee, on the other hand.

If every position in the United States government created by Congress and filled by the President by and with the advice of the Senate, or by the President, or by the head of a Department or by a Court of Law, is constitutionally a public office, no matter what it may be termed by Congress or by an Executive Department, natural persons as "public agents" are few in numbers and insignificant in their functions, and are persons who are required personally to fulfill the duties of the position, and are without any subordinates.

The term "agent" is used in the Statutes of the United States mainly with relation to those performing fiscal or financial duties or in making examinations of accounts; but in a large number of cases, these so called "agents" are regular superior or inferior officers of the United States assigned or detailed to perform these duties, as agents.

It will be seen that instances of *natural persons as agents* of the government having subordinates under them, so as to make them "principal public agents," are certainly quite rare, if any such have existed or do exist.

While the term agent does not appear to us to be used by Congress or the Departments with any degree of technical accuracy, yet there seems to be a well defined idea that there is some material difference between a public officer and a public agent.

The Law of Private Agency as applied to Public Agents: The appointment or election, rights, powers and duties of public agents are constitutional or statutory.

The application to public agency of the law which governs and controls private agency, is not technically accurate. The term public agent itself, although a very convenient one, and its use well established, is not strictly or technically correct.

The rule of respondeat superior is itself the outgrowth of public policy, and its application is superseded with reluctance and only in case of a clearly paramount and superior public policy.

While the line of distinction between the different degrees of public officers, public agents and public employees is probably not capable of exact definition, the gradations being so complicated and refined, in the case at bar it is certain that defendant in error, the railway company, is not a public officer, and is not entitled to rights and exceptions as such.

If defendant in error is held to be a public agent, the application to it of the rule of respondeat superior does not necessarily affect or interfere with its performance of the function or duty of carrying the mail assigned to it. Indeed the application of that rule would tend to produce, on the part of the railway company which is the one financially benefitted by the transaction, greater care and less negligence, which was the very object and purpose of the rule.

Neither defendant in error or its employee took any oath, gave any bond or was subject to any criminal statute. The employee is necessarily one of small, if any means, subject to execution.

A knowledge on the part of defendant in error and of its employees that there is no liability on the part of either to any one, no matter how carelessly or recklessly the employee cares for or handles the mail-sack and its valuable contents must tend to cause the very evils that the rule of respondeat superior was established to check and minimize.

It was suggested by counsel for defendant in error, in the Circuit Court of Appeals, that to hold defendant in er-

ror subject to the rule of respondeat superior would tend to increase to the government the cost of carrying the mail.

But the government pays to have the mail properly and carefully carried, that is,—carried safely. The railroad companies of the United States would certainly have poor standing in the halls of Congress and one without justice in a Court of law or equity when attempting to assert that the government must increase the amount paid for carrying the mail so as to compensate the companies for losses sustained through the negligence of their own employees, although, if there had been no negligence the compensation paid would have been adequate. This would be asking pay for negligence not for services rendered.

Three Contract Cases: We now desire to call attention to the cases of *Conwell v. Voorhees*, 13 Ohio Rep. 532, decided in 1844; *Hutchins v. Brackett*, 22 N. H. (2 Foster) 252, decided in 1850; *Foster v. Metts*, 55 Miss. 77, decided in 1877.

Each of these cases holds that a mail contractor is not liable for a loss of mail occasioned by the negligence of an employee of such mail contractor. and places a mail contractor on the same footing as a Postmaster, or other public officer.

Each of these cases was decided before the Sections 713 and 1023, Postal Laws and Regulations, 1893, were established in their present form, and without the effect of the provisions of these Sections upon the mind of either Court when rendering the decisions. These decisions are not precedents or law in the face of these Postal Laws and Regulations; nor are they sound expositions of the common law, independent of the above mentioned statutory provisions.

In the Ohio case of *Conwell v. Voorhees*, the opinion states that: "The mail contractor is *a sworn officer paid by "the government.*" (p. 542. * ""So far then as the trans- "mission of the mail is concerned, a mail contractor is a "public agent, and as such, only responsible." (p. 542.

13 *Ohio R.* 523; *Conwell v. Voorhees.* (1844).

In this and many other cases the terms "sworn officer," "public officer" and "public agent" are used very indefinitely and apparently as synonymous terms. An examination of the whole opinion shows that it is the manifest intent of the Court to declare a mail contractor to be a "public officer" and to give him the same exemption as a Postmaster is entitled to as a public officer. The fundamental

error lies in holding the mail-contractor to be a "public officer."

It will be observed that the "*Conwell*" case was decided in 1844, almost a quarter of a century before this court in 1868 in *U. S. v. Hartwell*, (73 U. S. 385,—18 Law 830), finally settled who was and who was not a "public officer" under the Constitution of the United States. The Ohio court was in error in holding that a mail-contractor was a public officer.

The fact that the only relation between the government and the contractor was contractual, under an express written contract, which alone defined the duties and rights of the contractor; that there was no agency for the government on the part of the contractor or of his employee and that the exemption from respondeat superior of an intermediate agent could not apply, is not considered by the Court.

In *Hutchins v. Brackett* (22 N. H. 252), the New Hampshire Supreme Court said: "We are not able to distinguish "*Conwell v. Voorhees* from this case. * He (the mail driv-"er Smith) takes an oath for the faithful discharge of his "duty, and is subject by law to various "penalties for viol-"ations of it." (p.256). * "We are, therefore, of opinion, "that the defendants cannot be charged in this action, be-"cause they are not liable for the defaults of Smith, their "subordinate public agent in the post office." (p. 256).

22 *N. H.* (2. *Foster*) 252; *Hutchins v. Brackett.* (1850).

The "*Hutchins*" case was also decided about eighteen years before the decision of the "*Hartwell*" case. The New Hampshire court accepts the decision in *Conwell v. Voorhees* as to the mail-contractor being a sworn officer of the government without discussing this proposition, and adjudged that the mail driver is "their subordinate public agent in "the post-office."

In *Foster v. Metts* (55 Miss. 77) the Mississippi Supreme Court followed *Conwell v. Voorhees* and *Hutchins v. Brackett.*

That court said:

"It (the government) carries them (the mails) by the "aid of agents it contracts with for the service. Contract-"ors for carrying the mails are the agents of the govern-"ment in the business undertaken by them. (p. 80.) Post-"masters are necessary agents for the performance of the "business of the Postoffice Department, and those who "carry the mail from place to place are equally necessary "and engaged in the business of the government. (p. 80.)

"The rider or driver employed by the contractor for carry-
"ing the mails is an assistant about the business of the
"government. (p. 80.) He is a *subordinate agent of the*
"*government*, whose employment is contemplated and pro-
"vided for by the government in contracting to have the
"mail carried." (p. 81.)

After referring to the exemption of *postmasters* from liability for their subordinates, the opinion says: "As re-
"marked before, carrying the mail is just as necessary, and
"as much a part of the business of the government, as the
"service rendered at the office *by postmasters*; and those
"employed about carrying the mails *are as much the agents*
"*of the government* as *are postmasters* and their clerks and
"assistants." (p. 82.)

55 *Miss.* 77; *Foster v. Metts.* (1877.)

Although decided in 1877, nine years after the *Hartwell* case, the attention of the Mississippi Court was not called to the *Hartwell* case, nor does that court appear to have been advised that this court had authoritatively settled the line of demarcation between public officers, and public agents other than public officers.

The opinion in the *Foster* case appears to use the words "public officer" and "public agent" synomyously and assumes that every public agent has the same exemption from liability as a public officer.

A careful examination of the *Conwell*, *Hutchins* and *Foster* cases above cited, shows very plainly that the distinction between public officers and public agents other than public officers, which is clearly recognized by eminent courts and text writers of distinction, is nowhere suggested or considered in any of these decisions. None of these cases is authority on the question here presented for consideration.

Another important legal principle is also overlooked in the *Conwell, Hutchins and Foster* cases. Public officers are agents of strictly defined and limited powers. The system of providing for the carriage of mail by contracts was so well defined and carefully elaborated by Acts of Congress in force when those cases were decided, which were, in the main repeated in the Revised Statutes of the United States in 1873 and 1878, that the intention of Congress to require the carrying out of this contract system was firmly established.

The officers of the United States entrusted with the power and duty of carrying out this contract system, could

not overthrow that system and establish one of agency in its place, there being no legislative sanction therefor. The limitation of the powers of officers empowered to make contracts are carefully considered in the New York case of,

95 *N. Y.* 572; *Seybolt v. N. Y. Railroad Co.* (1884.)

The legislative establishment of such system of contracts so clearly and unambigously expressed seems to us to be binding upon the Courts, and such legislation could not properly be construed into a system of agency.

It will also be observed that the opinions in the *Conwell*, *Hutchins* and *Foster* cases, above cited, profess to relate only to a mail contractor and his employee, when *both are duly sworn* into the postal service.

These decisions are criticised and disapproved generally by the text books and annotations and are in conflict with the better considered decisions.

After stating that contractors with the government are not public agents so as to exempt them from the operation of the rule of respondeat superior, *Shearman & Redfield* state that this rule applies to contractors for carrying the mail.

1 *Shearman & Redfield on Negligence*, (*5th ed.* 1898); *Sec.* 325, *p.* 557.

Mr. Mechem, in his work on Agency in the latter part of Sec. 574, says: "Whether contractors for carrying "the mails are public governmental officers within the "meaning of this rule, so as to be exempt from liability "for the default of their subordinates, is a question upon "which there is a conflict of authority, *but the better opin-*"*ion* is that they are not."

Mechem on Agency, *Sec.* 594.

Mr. Wharton, in his work on Negligence. says:

"Sec. 296: It has in some cases been broadly as-"serted, though for reasons by no means consistent, that "these officers are not liable for money lost through the "carelessness of their agents who carry the mail. On "the other hand, this has been disputed in a Virginia "case, distinguished for the ability with which it was "argued by the learned Judge who gave the opinion. In "that case it was held that a mail carrier is not an officer "officer of the government, but is the private agent of the "contractor for carrying the mail, and the contractor is "is liable to third persons for any injury sustained through "the negligence or default of such agent in the performance

"of his duties. It was further determined (and this may "enable us to reconcile this case with those elsewhere "cited), that the Act of Congress of March 3, 1825, re- "quires that mail carriers shall be sworn, and it is the duty "of the contractor to see that this is done. If the carrier "was not sworn, such was the conclusion, he is the private "agent of the contractor, for whose default the contractor "is liable to third persons, even if on being sworn the con- "tractor would not be liable for his acts."

Wharton on Negligence, (*2d ed.* 1878); *Sec.* 296, *p.* 267.

The decision in *Conwell v. Voorhees* is also commented upon and disapproved in the note following the report of that case in the American decisions, and the writer says concerning *Sawyer v. Corse*: "This seems, upon reason and "principle, to be the better doctrine and meets the approv- "al of the same able writers." (*Shearman v. Redfield*, Wharton and 1 Am. Lead cases).

42 *Am. Dec.* 208; *Note to Conwell v. Voorhees.*

The controlling authorities seem to overrule these few illy conducted cases.

In *U. S. v. Belew*, (2 Brock 280), it was held, in the opinion, by *Mr. Chief Justice Marshall*, that an individual carrier is "a person employed in any of the departments of "the general postoffice", under Sec. 18, Act of April 30th, 1810, regulating the Postoffice establishment.

The opinion says: "The first section of the act makes it the duty of the Postmaster General to provide for the "carriage of the mail on all post-roads that are or may be "established by law. The carriage of the mail, then, is a "part of the business of the Postmaster General; it is with- "his department of general postoffice."

Defendant's council insisted "he (defendant) must be an officer." The opinion said: "But this is not the object "of the law, the terms of the enactment do not require an "officer; they are satisfied with an agent, or any person "employed in any of the departments, or, in other words, "in the buisness allotted to the general postoffice. Nor do "they require that he shall be employed by the Postmaster "General, or by authority expressly delegated to him; it is "enough to satisfy the law that they are so employed."

2 *Brocken* 280; *U. S. v. Belew.* (1826).

DIVISION X.

SURROGATION.

"If insured buildings *or other property* be destroyed "through the fault or negligence of some person other "than the owner, the insurance company, upon payment, "will be subrogated to the right of the owner, to recover "from the wrongdoer. In such jurisdictions as have no "statutory provisions upon the subject, the action must "be brought in the name of the assured. In some juris- "dictions, however, it may be brought in the name of the "insurance company under statutes allowing actions to be "brought in the name of the real party in interest."

24 *Am. & E. Enc. of Law*, (1*st ed.*) *pp.* 306-308; *title*, "*Subrogation.*" 5*b.*

An insurer who has paid a loss caused by the negligent act of the railroad is entitled to subrogation, and may recover in its own name against the railroad company.

74 *Mo.* 106; *Hartford F. I. Co. v. Wabash Ry. Co.* (1898.)

50 *S. W. R.* (*Mo.*) 281; *Lumberman's M. I. Co. v. H. C. F. S. & M. Ry. Co.* (1899.)

See also:

80 *U. S.* (13 *Wall.*) 367, (20 *Law* 594); *Hall v. Nashville & C. Rd. Co.* (1871.)

129 *U. S.* 402, (32 *Law* 799); *Liverpool & G. W. S. Co. v. Phenix Ins. Co.* (1888.)

Conclusion: Under the facts of the case at bar it is established:

That defendant in error was not exclusively engaged in the government service, or in carrying the mail, but was pursuing its ordinary business at a common carrier of passengers and freight, incidentally rendering a public service in carrying the mail in connection with such usual business.

That its employe, Magson, was engaged in his regular business as local night agent of defendant in error, performing duties for defendant in error, as a carrier of passengers and freight; whatever Magson did in relation to the care of the mail was merely incidental to his ordinary business as an employee of said company.

That neither defendant in error nor its employee had qualified for the postal service by taking the postal oath.

That an ordinary unsworn employee of a railway company is unknown to the law, and a mere private employee of the company, and not an agent or employee of the government. Magson was hired by the company, on such terms as were mutually satisfactory to himself and the company, and the government had no power to employ or discharge him. By section 713, Postal Laws and Regulations, 1893, he was an employee of the defendant in error, and not in the government service.

Magson's compensation was not paid by the United States, or from fees fixed by law, but from the ordinary revenues of the company, and at times agreed upon between them, and not fixed by law.

No relation between the railway company and the government or between Magson and the government existed, such as to relieve defendant in error from liability under the rule of respondeat superior.

No exemption of a railway company carrying the mail from liability under the rule of respondeat superior is given by any Statute of the United States, and the application of that rule to a railway company, carrying the mail, does necessarily affect the authority given by the government th said company, or in any manner interfere with the operation of said company in such service.

That Magson was the private employe of the defendant in error and not a government agent.

For these reasons, we claim that such railway company is subject to liability under the rule of respondent superior for the default, negligence or misfeasance of its private employees while employed or concerned in the care or carriage of the mail.

Respectfully submitted,

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As we understand this record, the defendant in his brief fails to comprehend the significance of the facts stated in our complaint, and which involve the construction of the Statutes and Postal Laws, as well as the validity of the latter. The complaint states the following facts, which so involve the statutes and laws:

"That during the whole year A. D. 1900, and up to the present "time, defendant is and was engaged in carrying the United States "mails between the terminal and intermediate stations located upon "and along its said line of railroad, under and by virtue of the "Statutes and laws of the United States, and the regulations estab-"lished by the Postoffice Department of the United States govern-"ment and in pursuance of a fixing of the compensation to be paid "to defendant by the United States government for carrying said "mails and the person in charge thereof."

"That said depot, at or near the town of Harvey, was an in-"termediate station on that part of defendant's said line of railroad "within the State of North Dakota, which extends from the sta-"tion at Hankinson to the station at Portal, and the railroad line "between said stations at Hankinson and Portal is designated by "and known to the Postoffice Department of the United States, as "Railroad Route No. 161,018."

"That during all of the period hereinbefore referred to, there "was no contract of any kind between defendant and the United "States government, concerning or providing for the carriage, by "defendant, of said mails, or any part thereof, or of the person in "charge of said mails, upon or along defendant's said line of rail-"way or any part thereof."

"That upon the arrival of defendant's said train and postal car "at said town of Harvey, North Dakota, said railway mail-clerk, or "other postal official, between eleven and twelve o'clock of said "night, delivered said mail sack, duly locked, together with said "registered package of currency therein contained to one James "Magson, the night station agent, or night operator of defendant at "said town of Harvey; that said night station agent, or night oper-"ator, was not sworn as an official or employe of the postoffice de-"partment of the United States government, as required by law, "but was then and there employed and duly authorized by the de-"fendant to receive and take charge of all mail matter received over "defendant's said line of railway, at said town of Harvey, includ-"ing the mail sack or mail pouch containing said package of cur-

"rency, and to deposit same in defendant's depot, at Harvey, North "Dakota, and did so receive, take charge of and deposit said mail "sack, or mail pouch. That defendant was not sworn as an official "or employe of the postoffice department of the United States gov- "ernment, and had not subscribed or sworn to any oath relating to "or concerning the carriage of the United States mails, or the per- "formance of defendant's duties as such carrier of the mails."

"The railroad company will also be required to take the mails "from and deliver them into all intermediate postoffices and postal "stations located not more than 80 rods from the nearest railroad "station at which the company has an agent or other representative "employed."

"That said postoffice at Harvey was an intermediate postoffice "and was located not more than 80 rods from defendant's railroad "station, or depot, at, or near said town of Harvey."

"That under said postal regulation it was the duty of said de- "fendant to provide a sufficient and safe receptacle or place for the "safety and security of said mail, while in its said custody; also to "safely care for and guard said mail sack and its contents during "the night; also to safely deliver the same to the postmaster or post- "mistress at the postoffice in said town of Harvey, North Dakota."

As we understand the law, it is the purpose of pleading to state the facts, and not conclusions of law, or the law itself. Our complaint does not copy the statute or laws of the United States verbatim, but does set out the facts on which we claim under an application and construction of the statute and laws of the United States. And we contend:

First, The defendant in error carries the United States mail by virtue of the acts of Congress, and the order of the Postmaster-General, issued by virtue of the laws of the United States. The cause of action in suit involves a construction of these statutes, and a determination of the duties of the defendant in error arising therein. The question of whether the relations between the defendant in error and the United States is one of contract is immaterial, because such contract, if any exists, consists of the laws of the United States only and the acquiescence of the defendant in error in the provisions of those laws, and in no way changes the statutes or laws themselves. The determination of the duty of defendant in error to plaintiff in error in this case is a construction of those laws.

Second. The validity of the postal laws, sections 713 and 1025, depend upon the authority of the Postmaster-General to so make and promulgate them, and directly involves a determination by this court of the authority of the Postmaster-General under the acts of Congress relating to that official. The two determining points in

the decision of the circuit court were, (a) that Magson was the agent of the government in so far as he handled the mail, instead of the agent or employe of the railroad company, as provided by section 713; (b) that the railroad company was not required to provide a safe place or room for keeping of the mail, as provided by section 1028 and the determining point of the circuit court of appeals (which in its discussion of the question ignored the second of above propositions, but did affirm it by its general order of affirmance) is that Magson, in so far as he handled the mails, was a government agent, instead of a railway employe, in contravention to section 713. These two questions depend upon, and directly involve, in effect denying the validity of said sections 713 and 1028 overruling and nullifying the acts of the Postmaster-General in their enactment.

Third. On page 11 of brief, Defendant in Error says: "4. The "patent questions arising in the suit disclosed by the amended com- "plaint as a whole, upon the decision of which the result depends, "are evidently these: Was the money lost by negligence? If so, "then was the relation between plaintiff, or its assignor, and the de- "fendant such that this action could be maintained?" We take direct issue with this supposition. These questions are involved in the case, and are admittedly common law questions, but they are secondary to the determining propositions of this case, for when we have determined both of these questions in favor of the plaintiff, by competent evidence, we would still fall far short of a complete cause of action. The responsibility of the defendant would still require a construction of the laws of the United States relating to the duties of the defendant to carry the mail safely, especially section 4000 of the revised statutes of the United States, and Postal Laws and Regulations, sections 713 and 1028 and there is no responsibility resting upon the defendant, excepting as imposed by those laws. Except for these laws of the United States the defendant would not be concerned with the mail and could owe no duty to any one interested in the mails.

Fourth. The complaint states that defendant was not sworn into the government, that Magson was the agent of the defendant and not in the government service. The demurrer admits that fact, and, therefore, as a common law proposition independent of the statutes of the United States and postal laws, and defendant would therefore be liable. Whatever relief the defendant has from this common law rule is by virtue of the laws of the United States.

We have carefully considered the cases cited in defendant's brief, and will briefly refer to them and attempt to show either that they are not applicable to the case at bar or that they uphold our contention.

Colorado Mining Co. vs. Truck, 150 U. S., 138.

The only question in this case was the question of the opposite parties being citizens of different states. This was the only question alleged for obtaining jurisdiction in the United States circuit court. Suit was brought for ejectment and damages, rents, profits, etc., of a mine. Judgment for plaintiff, and appeal dismissed.

Borgmeyer vs. Idler, 159 U. S., at 412.

Suit brought for claimed commissions, and money advanced in the prosecution of a claim against Venezuela. Parties were residents of different states, and that was the only jurisdictional question. Held that the decision of court of appeals was final; and other questions cannot be injected into case by argument or otherwise.

Louis Loeb vs. Trustees of Columbia Township, Hamilton County, Ohio, 179 U. S., 472.

Action brought to recover on bonds issued for widening and extending Williams Avenue. Defendant demurred, setting up three grounds. Overruled as to first and second, and sustained as to third. This ground was: "That the act contravened the provisions "of the constitution of the United States, and, therefore, bonds "were invalid." Appeal taken directly to the United States supreme court, which held, that although the jurisdiction of the United States circuit court was obtained originally by the diversity of citizenship, still when defendant set up a constitutional right, jurisdiction of the United States supreme court attached. Held, it would have been otherwise, however, (page 478) had plaintiff carried case to the Circuit Court of Appeals. At page 483 court says:

N. B.—"What was said in opinion * * * does not preclude "the court from looking into the opinion of the trial court for "any purpose whatever, as, for instance, for the purpose of ascer- "taining *whether either party claimed, in proper form*, that a state "law * * * was in contravention of the constitution of the "United States."

Same case, at page 483 says:

"Arguments of counsel form no part of the record."

Also (same page):

"The rule of our court referred to does not apply alone to cases "brought here from the highest court of the state. *It applies in "terms to all cases brought to this court by a writ of error or appeal.*"

At page 483:

"The result is that this court has jurisdiction to review the judg-"ment of the circuit court, *and determine every question properly* "*arising in the case.*"

American Sugar Refining Company vs. New Orleans, 181 U. S., 281-282.

"If case arises where it appears in the record from plaintiff's own "statement of the case * * * that the suit involves a dispute "or controversy as to a right which depends upon the construction "or application of the constitution, *or some law* or *treaty* of the "United States * * * (cases cited). These cases fall strictly "within the terms of Section 5. The appellate jurisdiction of this "court in respect to them is exclusive."

Also; if plaintiff by proper pleading shows the jurisdiction of the circuit court on diverse citizenship, *and also on grounds independent of that.* * * * and the case is taken to the court of appeals. Propositions as to the *latter* grounds may be certified * * * and an appeal or writ of error would be under the last clause of section 6, because jurisdiction would not depend solely on diverse citizenship. Citing:

Union P. Ry. Co. vs. Harris, 158 U. S., 326.

Huguelay Mfg. Co. vs. Galeton Cotton Mills, 184 U. S., at 295.

"If the jurisdiction of the circuit court rests solely on the ground "that the suit arises under the constitution, laws or treaties of the "United States, then the jurisdiction of this court is exclusive; but "if it is placed in diverse citzenship, *and also on grounds independ-*"*ent of that,* then, if carried to the court of appeals, the decision of "that court would *not* be final, and appeal or writ of error would be

Citing:

American Sugar Refining Co. vs. New Orleans, 181 U. S., 277; 45 L. Ed. 851.

21 Supreme Court Reporter, 646.
Memo.

In this case, diversity of citizenship was the only ground set out to show jurisdiction, and appeal was dismissed in United States supreme court.

Little York Gold Washing and Water Co., Limited, Plaintiff in Error, 96 U. S. 199-204, at page 658.

"It is well settled that in the court of the United States the special "facts necessary for jurisdiction must *in some form* appear in the "record of every suit, and that the right of removal * * * is "statutory."

Further on in same opinion, it says:

"*The office of pleading is to state facts, not conclusions of law.* "It is the duty of the *court to declare the conclusions,* and of the "*parties to state the premises.*"

In this case no *fact* was stated giving jurisdiction.

Ansbro vs. United States, 159 U. S., 695, not applicable.

Ansbro was convicted for discharging or dumping dirt or refuse within the harbor—adjacent water of New York City.

Held not an *infamous* crime, punishable by imprisonment in the penitentiary, it being a *misdemeanor* only, and United States court had no jurisdiction.

McCain vs. Des Moines, 174 U. S., 168.

Shows parties all residents of Iowa, and no constitutional question raised; also that matter had been previously passed upon by supreme court of Iowa in *State of Iowa (Ex rel West) vs. City ..of Des Moines, 96* Iowa, 521. A Quo Warranto case.

Starin vs. New York, 115 U. S., 248-247.

No question was stated showing a shadow of jurisdiction; a suit upon contract, etc., and petition dismissed.

NewOrleans vs. Benjamin, 153 U. S., 411-424.

Not applicable.

St. Joseph & Grand Island Ry. Co. vs. R. M. Steel, Sheriff Doniphan County, Kansas.

Citation in defendant's brief correct, but it was a case brought by a resident of Kansas against the railroad company substituting and created under the laws of Kansas and Nebraska and held not to be a "diversity of citizenship." (See page 663.)

Hanford vs. Davies, 163 U. S., 273-279.

Parties all citizens of the state of Washington and no constitutional question raised. Demurrer sustained and affirmed.

Western Union Telegraph Co. vs. Ann Arbor Ry. Co., 178 U. S., 239-243.

After stating what is in defendant's brief the court adds: (Page 244). "As we have said, it was not asserted in the argument that the telegraph company had the right independently of the contract to maintain its line on the railroad company's property, and in view of the settled construction of the statute we could not permit such contention to be recognized as a basis of jurisdiction."

In answer to the cases referred to above, with the casual remarks attendant therewith, we again refer to the cases cited by plaintiff in error in brief, on pages 12 to 16 inclusive, which answers the proposition of defendant as fully as if their brief had already been served and filed when our brief was written.

The defendant makes great effort to convince this court that plaintiff's case did not involve a construction of the laws of the United States in the court below.

In the opening pages hereof we cite some of the statement of facts, the application of which to the issues of this case involve a construction of the laws of the United States, and the rights of this plaintiff depend upon the construction of the laws of the United States relating to carrying the United States mail, contended for by plaintiff, and the filing and submitting of the demurrer by defendant, admitted all the salient points that were well pleaded in plaintiff's complaint.

1st. That Magson was an employe of the defendant railway company by virtue of section 713 postal law.

2nd. That the defendant railway company did not furnish a safe room or apartment for the keeping of the mail, and were thereby negligent, by virtue of section 1025 postal laws.

3d. That they were carrying the mail under the provisions of act of Congress, and became responsible to the plaintiff for its safety, by virtue of section 4000, Revised Statutes.

It is true plaintiff did not cite the statutes relied upon in their numerical order in their complaint, nor copy same therein, but they are sufficiently referred to and cited to bring them to the court's attention, and were entitled to the proper consideration. In fact, we feel it would have been in bad form to set them out verbatim, they being propositions of *law* which should be construed and applied to them by the court.

We concede that the Circuit Court and Circuit Court of Appeals would take judicial notice of the laws and Postal Regulations of the United States, especially when their attention was called to them by reference.

By reference to page 21 of plaintiff's brief, we called attention of this court to the fact: "This court takes judicial notice of department rules and regulations."

Caba vs. United States, 152 U. S., 221.

"Such regulations when they have been recognized by congress, have the force of law."

"The regulation involved in this litigation is recognized by the act of Congress approved March 3, 1887."

MERITS OF THE CASE.

The action against defendant is based upon his tort in failing to carry the mail safely, and is in no way concerned with the relations between defendant and the government.

The case involves such common law questions as grow out of the acts of negligence complained of.

In addition, and necessarily involved in the solution, in so far as the responsibility of defendant for the United States mail, is concerned the construction of the laws of the United States.

At this time we will note the common law questions briefly.

The defendant cites a large number of cases brought on the theory that water companies were responsible for loss by fire when they failed to furnish water to extinguish such fires. Those cases are not applicable to this case.

It is true that the court also investigated the question of the contractual relations between the various water works companies and the municipalities, and properly found that the plaintiffs in those cases could not recover in actions based upon contracts to which they were not parties. But this was a secondary feature.

This case is not founded upon the relations between the government and the defendant, but upon the fact that the defendant failed to perform a statutory duty, and thereby damaged the plaintiff.

The determining question in water company cases cited by defendant is the holding now well established as law that the municipality or the water company, furnishing water to a municipality, is under no legal duty to so furnish water to individuals residing in the municipality to be used in extinguishing fires. Held, so failing to supply water is not a wrong or tort. Had the ruling established the reverse of the proposition as law, then such cases would be the same as the case at bar, and the defendants held liable.

Defendant calls attention to a case decided by the supreme court

of Iowa, *The Boston Insurance Company vs. The Chicago R. I. & Pac. Ry. Co.*, 92 N. W. Rep., 88, and seem to base some claim in the argument thereon. We ask the court to examine that case, and by so doing you will find that it involves but little, if any, of the legal propositions in this case at bar. In that case the action is based upon a state of facts substantially as follows:

The passenger train of defendant included a regular postoffice car, with the postal clerk therein on duty. The train was wrecked by an accident, the postal clerk killed, and the mail in the car, destroyed by fire, which occurred in connection of the accident.

At the time of the accident the mail was not in the custody and possession of the defendant, but in fact was in the actual custody and possession of the postal clerk duly sworn into the postal service of the United States. The mail not being in the actual custody or possession of the defendant their liability or non liability depends upon an entirely different legal proposition than the case at bar.

HORATIO F. DALE,
WM. CONNOR,
GEO. W. BOWEN,
A. U. QUINT,
Attorneys for the Plaintiff in Error.

Supreme Court of the United States

OCTOBER TERM, 1903

No. 141

BANKERS' MUTUAL CASUALTY COMPANY,

Plaintiff in Error,

vs.

THE MINNEAPOLIS, ST. PAUL & SAULT SAINTE MARIE RAILWAY COMPANY,

Defendant in Error.

IN ERROR TO THE UNITED STATES CIRCUIT COURT FOR THE EIGHTH CIRCUIT.

I.

OF THE JURISDICTION OF THE COURT.

The first question which arises in this case is that of the jurisdiction of this court to review the judgment of the Circuit Court of Appeals on writ of error.

1. Section 6 of the Circuit Court of Appeals Act provides that the Circuit Court of Appeals shall exercise appellate jurisdiction to review by appeal or writ of error, final decisions in the Circuit Court in all cases other than those provided for in Section 5 of that Act, defining the cases which may be taken to the Supreme Court directly from the Circuit Court. It further provides that the decisions of the Circuit Court of Appeals shall be final in all cases where the *jurisdiction of the Circuit Court depends entirely upon diverse citizenship of the parties;* also in other cases not involved here. It is further provided that in all cases not made final in said Section

6, there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed $1000.00 besides costs.

It is necessary, therefore, to inquire into the grounds of the jurisdiction of the Circuit Court in this case in order to determine the jurisdiction of this Court.

It clearly appears that the Circuit Court acquired jurisdiction on the ground that the parties were citizens of different states. (Record page 31). But that is not sufficient by the very terms of the statute and this Court has so decided.

Colorado Central Mining Co. v. Turck, 150 U. S. 138;
Borgmeyer v. Idler, 159 U. S. 408.

There is but one other possible ground which can be claimed as the basis of jurisdiction, namely, that this is a suit "arising under the constitution or laws of the United States." But this must clearly appear from the amended complaint itself, unaided by any claim made in the argument of counsel or any ground of the decision of the Court. It makes no difference how many federal questions may have come into this case after the Circuit Court acquired jurisdiction, because if the jurisdiction was in fact acquired solely upon the ground of diverse citizenship the decision of the Circuit Court of Appeals is final by the clear words of the statute; and it has been so decided by this Court.

Loeb v. Columbia Township Trustees, 179 U. S. 472;
American Sugar Refining Co. v. New Orleans, 181 U. S. 277;
Huguley Mfg. Co. v. Galeton Cotton Mills, 184 U. S. 290.

So it becomes necessary to consider all the allegations of the amended complaint that could in any view be relied on in support of this ground of jurisdiction claimed by plaintiff in error; because upon the statement of fact therein the Circuit Court acquired jurisdiction, and not otherwise.

2. The amended Complaint (Record, pp. 31-37), after stating the citizenship of the parties, alleges as follows:

> "That during the whole year A. D. 1900, and up to the present time, defendant is and was en-

gaged in carrying the United States mail between the terminal and intermediate stations located upon and along its said line of railroad, under and by virtue of the statutes and laws of the United States, and the regulations established by the Postoffice Department of the United States Government and in pursuance of a fixing of the compensation to be paid to the defendant by the United States Government for carrying said mails and the person in charge thereof, based upon the last preceding reweighing of said mails and upon notice in writing, in the usual form, from the Second Assistant Postmaster General of the United States, requiring defendant to carry said mails and the person in charge thereof.

"That said depot, at or near the town of Harvey, was an intermediate station on that part of defendant's said line of Railroad within the State of North Dakota, which extends from the Station at Hankinson to the Station at Portal, and the Railroad line between said Stations at Hankinson and Portal is designated by and known to the Postoffice Department of the United States, as Railroad Route No. 161,018, being a distance of 344.58 miles, and the compensation fixed by the United States Postoffice Department to be paid annually by the United States to Defendant, during all of the period herein referred to for the carriage of said mails and the person in charge thereof is and was the sum of sixty-four thousand eight hundred and fifteen and 49-100 dollars ($64.815.49) at the rate of $188.10 per mile.

"That this substituted plaintiff is not in possession of the aforesaid notice to defendant, and is unable to attach to this petition said notice or a true copy thereof.

"That during all of the period hereinbefore referred to, there was no contract of any kind between defendant and the United States Government, concerning or providing for the carriage, by defendant, of said mails, or any part thereof, or of the person in charge of said mails, upon or along defendant's said line of railway or any part thereof." (Record, pp. 31 and 32).

Then follow allegations covering the sending of the money package in question in the custody of the agents of the Government, other than the defendant and its employes, to Harvey, and the complaint alleges further:

> "That upon the arrival of defendant's said train and postal car at said Town of Harvey, North Dakota, said railway mail clerk or other postal official, between eleven and twelve o'clock of said night, delivered said mail sack, duly locked, together with said registered package of currency therein contained to one James Magson, the night station agent, or night operator of defendant at said Town of Harvey, that said night station agent or night operator, was not sworn as an official or employee of the Postoffice Department of the United States Government, as required by law, but was then and there employed and duly authoried by the defendant to receive and take charge of all mail matter received over defendant's said line of Railway, at said Town of Harvey, including the mail sack or mail pouch containing said package of currency, and to deposit same in defendant's depot, at Harvey, North Dakota, and did so receive, take charge of and deposit said mail sack, or mail pouch.
>
> "That defendant was not sworn as an official or employee of the Postoffice Department of the United States Government, and had not subscribed or sworn to any oath relating to or concerning the carriage of the United States Mails, or the performance of defendant's duties as such carrier of the mails.
>
> "That Section 713 of the postal laws and regulations of the United States of the year A. D. 1893, which was in force at the time of the receipt and transmission of said registered postage is in words and figures as follows, to-wit: 'The railroad company will also be required to take the mails from and deliver them into all intermediate postoffices and postal stations located not more than 80 rods from the nearest railroad station at which the company has an agent or other representative employed.'

> "That said Postoffice at Harvey was an intermediate postoffice and was located not more than 80 rods from defendant's railroad station, or depot, at, or near said Town of Harvey.
>
> "That under said postal regulation it was the duty of said defendant to provide a sufficient and safe receptacle or place for the safety and security of said mail while in its said custody, also to safely care for and guard said mail sack, and its contents during the night, also to safely deliver the same to the postmaster or postmistress at the Postoffice in said Town of Harvey, North Dakota." (Record, pp. 34 and 35).

Then follows an account of the alleged lack of care of the defendant and its agent, the larceny of the money package, and demand for judgment.

3. The sufficiency of this complaint to sustain the claim of jurisdiction on the ground that it shows a suit "arising under the Constitution or laws of the United States" must be tested by rules firmly settled by the decisions of this Court.

In *Gold-Washing Company v. Keyes*, 96 U. S. 199, 202, Mr. Chief Justice Waite used the following language:

> "The office of pleading is to state facts, not conclusions of law. It is the duty of the court to declare the conclusions, and of the parties to state the premises.
>
> "In this petition, the defendants set forth their ownership, by title derived under the laws of the United States, of certain valuable mines that can only be worked by the hydraulic process, which necessarily requires the use of the channels of the river and its tributaries in the manner complained of; and they allege that they claim the right to this use under the provisions of certain specified acts of Congress. They also allege that the action arises under, and that its determination will necessarily involve and require the construction of, the laws of the United States specifically enumerated, as well as the pre-emption laws. They state no facts

to show the right they claim, or to enable the Court to see whether it necessarily depends upon the construction of the statutes.

"Certainly, an answer or plea, containing only the statements of the petition, would not be sufficient for the presentation of a defence to the action under the provisions of the statutes relied upon. The immunities of the statutes are, in effect, conclusions of law from the existence of particular facts. Protection is not afforded to all under all circumstances. In pleading the statute, therefore, the facts must be stated which call it into operation. The averment that it is in operation will not be enough; for that is the precise question the court is called upon to determine.

"The statute referred to contain many provisions; but the particular provision relied upon is nowhere indicated. A cause cannot be removed from a State court simply because, in the progress of the litigation, it may become necessary to give a construction to the Constitution or law of the United States. The decision of the case must depend upon that construction. The suit must, in part at least, arise out of a controversy between the parties in regard to the operation and effect of the Constitution or laws upon the facts involved. That this was the intention of Congress is apparent from Sect. 5 of the Act of 1875, which requires the Circuit Court to dismiss the cause, or remand it to the State court, if it shall appear, 'at any time after such suit has been brought or removed thereto, that such suit does not really or substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court.'

"Before, therefore, a circuit court can be required to retain a cause under this jurisdiction, it must in some form appear upon the record, by a statement of facts, 'in legal and logical form,' such as is required in good pleading (1 Chit. Pl. 213), that the suit is one which 'really and substantially involves a dispute or controversy' as to a right which depends upon the construction or effect of the Constitution, or

> some law or treaty of the United States. If these facts sufficiently appear in the pleadings, the petition for removal need not restate them; but, if they do not, the omission must be supplied in some form, either by the petition or otherwise. Under the application of this rule, we think that the record in this case is insufficient, and that the Circuit Court did not err in remanding the cause."

What is said here is in essence re-affirmed in *American Sugar Refining Company, v. New Orleans,* 181 U. S. 277, where the Court, speaking by Mr. Chief Justice Fuller, says on the same subject:

> "A case so arises where it appears on the record from the plaintiff's own statement, in legal and logical form, such as is required by good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction or application of the Constitution, or some law, or treaty, of the United States." Citing *Gold Washing & Water Co. v. Keyes,* 96 U. S. 199; *Blackburn v. Portland Gold Mining Co.,* 175 U. S. 571; *Western Union Telegraph Co. v. Ann Arbor Railroad Company,* 178 U. S. 239.

Again is *Ansbro v. United States,* 159 U. S. 695, the Court spoke as follows:

> "A case may be said to involve the construction or application of the Constitution of the United States when a title, right, privilege or immunity is claimed under that instrument, *but a definite issue in respect of the possession of the right must be distinctly deducible from the record* before the judgment of the Court below can be revised on the ground of error in the disposal of such a claim by its decision."

In *McCain v. Des Moines,* 174 U. S. 168, the Court, speaking by Mr. Justice Peckham, says:

> "The facts alleged must show the nature of the suit and it must plainly appear that it arises under the Constitution or laws of the United States; that is, there must be a real and substantial dispute as to the effect or construction of the Constitution or some law of the United States upon the determination of which the recovery depends."

In *Bridge Proprietors v. Hoboken Company*, 1 Wall. 116, 143, Mr. Justice Miller, commenting on the rules laid down in *Crowell v. Randall*, 10 Peters 368, and *Armstrong v. The Treasurer of Athens County*, 16 Pet. 281, said:

> "Now, although there are other decisions in which it is said that the point raised must appear on the record, and that the particular act of Congress, or part of the Constitution supposed to be infringed by the State law, ought to be pointed out, it had never been held this should be done in express words. But the true and rational rule is, *that the court must be able to see clearly, from the whole record, that a certain provision of the Constitution or act of Congress was relied on by the party who brings the writ of error*, and that the right thus claimed by him was denied."

In *Starin v. New York*, 115 U. S. 248, 257, it was said by Mr. Chief Justice Waite, speaking for the Court:

> "The character of a case is determined by the questions involved. Osborne v. Bank of the United States, 9 Wheat. 824. If from the questions it appears that some title, right, privilege or immunity on which the recovery depends will be defeated by one construction of the Constitution or a law of the United States, or sustained by the opposite construction, the case will be one arising under the Constitution or laws of the United States within the meaning of that term as used in the Act of 1875. Otherwise not. Such is the effect of the decisions on this subject." Citing *Cohens v. Virginia*, 6 Wheat. 264, 379;

Osborn v. Bank of the United States, 9 Wheat. 737, 824; *The Mayor v. Cooper*, 6 Wall. 247, 252; *Gold Washing & Water Co. v. Keyes*, 96 U. S. 199, 201; *Tennessee v. Davis*, 100 U. S. 257, 264; *Railroad Co. v. Mississippi*, 102 U. S. 135, 140; *Ames v. Kansas*, 111 U. S. 449, 462; *Kansas Pacific v. Atchison R. R.*, 112 U. S. 414, 416; *Provident Savings Co. v. Ford*, 114 U. S. 635, 641; *Pacific Railroad Removal Cases*, 115 U. S. 1, 11.

In *Shreveport v. Cole*, 129 U. S. 36, Mr Chief Justice Fuller, delivering the opinion of the Court, said:

> "Unless this suit 'was one arising under the Constitution or laws of the United States' the Circuit Court had no jurisdiction; and if it did not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution or some law upon the determination of which the recovery depended, then it was not a suit so arising."

In *New Orleans v. Benjamin*, 153 U. S. 411-424, the Court by Mr. Chief Justice Fuller, said:

> "When a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution, upon the determination of which the result depends, then it is not a suit arising under the Constitution."

In *St. Joseph, etc., Ry. v. Steele*, 167 U. S. 659, the Court, speaking by Mr. Justice Shiras, said:

> "There must be a real, substantial question on which the case may be made to turn. Nor can jurisdiction be inferred argumentatively from the averments in the pleadings, but the averments should be positive." *Hanford v. Davies*, 163 U. S. 273, 279.

In *Hanford v. Davies*, Mr. Justice Harlan, speaking for the Court, said:

> "But this allegation of want of jurisdiction in the probate court is too general and indefinite to show that its proceedings were wanting in due process of law. If the purpose was to present a case under the clause of the Constitution relating to due process of law, the grounds upon which the Federal court could take cognizance of a suit of that character between citizens of the same state should have been clearly and distinctly stated in the bill. It is well settled that, as the jurisdiction of a Circuit Court of the United States is limited in the sense that it has no other jurisdiction than that conferred by the Constitution and laws of the United States, the presumption is that a cause is without its jurisdiction unless the contrary affirmatively appears; and that it is not sufficient that jurisdiction may be inferred argumentatively from averments in the pleadings, but the averments should be positive. *Brown v. Keene*, 8 Pet. 112; *Grace v. American Central Ins. Co.*, 109 U. S. 278, 283, and authorities cited. These principles have been applied in cases where the jurisdiction of the Circuit Court was invoked upon the ground of diverse citizenship. But they are equally applicable where its original jurisdiction of a suit between citizens of the same State is invoked upon the ground that the suit is one arising under the Constitution or laws of the United States. We are not required to say that it is essential to the maintenance of the jurisdiction of the Circuit Court of such a suit that the pleadings should refer, in words, to the particular clause of the Constitution relied on to sustain the claim of immunity in question, but only that the essential facts averred must show, not by inference or argumentatively, but clearly and distinctly, that the suit is one of which the Circuit Court is entitled to take cognizance. *Ansbro v. United States*, 159 U. S. 695."

In *Western Union Telegraph Co. v. Ann Arbor R. R.*, 178 U. S. 239, 243, Mr. Chief Justice Fuller, speaking for the Court, said:

> "When a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution or laws of the United States, upon the determination of which the result depends, it is not a suit arising under the Constitution or laws. And it must appear on the record, by a statement in legal and logical form, such as is required in good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the Constitution or some law or treaty of the United States, before jurisdiction can be maintained on this ground." Citing, *Gold Washing & Water Co., v. Keyes*, 96 U. S. 199; Blackburn *v. Portland Gold Mining Co.*, 175 U. S. 571.

4. The patent questions arising in the suit disclosed by the amended complaint as a whole, upon the decision of which the result depends, are evidently these: Was the money lost by negligence? If so, then was the relation between the plaintiff, or its assignor, and the defendant such that this action could be maintained? These are questions arising every day in the courts of the country and they are determined upon general principles of law. Is there anything which differentiates this case and brings it within the rules laid down by the Court, supra. Does it appear that any right asserted by the plaintiff will be defeated by one construction of the Constitution, or any law of the United States, or sustained by the opposite construction? Can the court from inspecting this complaint conclude that any such issue was raised by the plaintiff, or that the case was based upon any such consideration? We have, to be sure, a transaction connected with the United States Mail service, which service had its origin in the Constitution and laws of the United States, the same as any other function of government; and if there had been no provision of the Constitution authorizing Congress to establish postoffices and post routes, and no laws passed by the Congress in the exercise of that power, certainly that transaction could not have arisen. But it

seems too plain for argument that such considerations do not bring this case within the rules.

From the language quoted it is plain that no "title, right, privilege or immunity under the Constitution of the United States" is claimed in the amended complaint; nor considering it in view of the general demurrer, is it possible to deduce any issue whatever in respect to any such right from the complaint. This cannot be a case, then, arising under the Constitution. *Ansbro. v. United States,* 150 U. S. 695, supra. The question is thus narrowed to the claim that it is a case arising under the laws of the United States, and this is the claim made by counsel for plaintiff in error in Subdivision 4, page 12 of their brief.

As I understand the decision in *Bridge Proprietors v. Hoboken,* 1 Wall. 116, supra, its purpose was to announce a somewhat less rigid rule than some earlier decisions referred to in the opinion had laid down. But it is there held to be necessary "That the court must be able to see clearly, from the whole record that a certain provision of the Constitution or act of Congress was relied on by the party who brings the writ of error."

This degree of precision in pleading the facts on which the plaintiff relies in invoking the jurisdiction of the Court, is upheld by the decisions from which quotations are made above. It is noticeably enforced in *Gold Washing & Water Co. v. Keyes,* 96 U. S. 199, 201, where the petition for removal, referring to statutes much more specifically than is done in the complaint here, was reviewed and the Chief Justice said:

> "The statutes referred to contain many provisions; but the particular provision relied upon is nowhere indicated. A cause cannot be removed from a State court simply because, in the progress of the litigation, it may become necessary to give a construction to the Constitution or laws of the United States."

Looking at the facts stated in the amended complaint it is apparent that there is but the most general reference to the laws of Congress. The only specific reference to anything in the nature of a law is to Section 713 of the Postal Laws and Regulations of

the United States of the year 1893, which was alleged to be in words and figures, as follows, to-wit:

> "The railroad company will also be required to take the mails from and deliver them into all intermediate post offices and postal stations located not more than 80 rods from the nearest railroad station at which the company has an agent or other representative employed."

Even so far as this is concerned, and much more with respect to the general reference to all the Postal laws of the United States, this complaint is obnoxious to the rules laid down by the court, for as said by Mr. Chief Justice Waite in the *Gold Washing & Water Company* case:

> "They also allege that the action arises under, and its determination will necessarily involve and require the construction of, the laws of the United States specifically enumerated, as well as the pre-emption laws. They state no facts to show the right they claim, or to enable the court to see whether it necessarily depends upon the construction of the statutes."

And again:

> "The immunities of the statutes are, in effect, conclusions of law from the existence of particular facts. Protection is not afforded to all under all circumstances. In pleading the statute, therefore, the facts must be stated which call it into operation. The averment that it is in operation will not be enough; for that is the precise question the court is called upon to determine."

Is it too much to say that it is quite impossible for the court, by an inspection of this complaint, to see clearly or otherwise that any title, right, privilege or immunity is asserted by the plaintiff under any law of Congress, or under all of them? Or is it possible for the court to discern that there is any question here which "really and substantially involves a dispute or controversy as to a right

which depends upon the construction of some law of the United States", or, in short, that this claim of negligence, and responsibility for negligence, can be determined for or against the plaintiff in error by the construction of any law of Congress brought to the attention of the Court by the complaint, or any other known to exist?

5. The rights which the plaintiff in error seeks by argument to deduce from the laws of Congress and the postal regulations are two. First, that the railroad company was carrying the mails under an obligation imposed by law, and not under a contract. Second, that the Court of Appeals and the Circuit Court alike were in error in holding that the night agent of the defendant at Harvey was an agent of the government because a postal regulation, which is not referred to in the complaint, provides that mail arriving at night shall be received by some suitable employe of the defendant and cared for during the night, and deposited in the post office in the morning, adding that such employe need not be sworn because he is not an employe of the United States. Counsel seeks to deduce from this postal regulation, which is not pleaded, not only a standard of care different from that imposed by the general law, but also a statutory determination of the question whether the night operator was an agent of the government or not. But none of these claims are apparent from the complaint itself, which was the measure of the jurisdiction of the Circuit Court. The only thing in the complaint, bearing upon either ground is the denial by the plaintiff in error of the existence of any contract between the defendant and the government with respect to the carrying of the mails. Of this it must be said that, considering the alllegations of the complaint without reference to this denial, in the light of the practice of the government from the beginning, of which the court will take notice, the clear inference to be drawn is that the service referred to was being rendered in pursuance of a contract. Indeed it is not too much to say that these allegations of the complaint give rise to a conclusive pre sumption of law that the services rendered were in pursuance of a contract. This is true because no mail was ever carried, in time of peace at least, in any other way. Even the land grant roads are carrying the mails in pursuance of contracts with the government, for by accepting their charters with the provisions

therein contained with reference to carrying the mails, they thereby entered into contracts with the government; for all time, it may be, but none the less contracts.

The Circuit Court said, in overruling the demurrer to the amended complaint:

> "The statement of fact is the same in substance as in the original complaint. The added statement that there was no contract between the United States and the defendant for the carriage of the mails is overborne by specific particular statements of fact showing the contrary." (Record, p. 43).

In addition to this, it must be said that this allegation is a mere conclusion of law, or the expression of opinion by the pleader as to the effect of the other allegations of the complaint. In this respect this allegation clearly violates the rule stated by Mr. Chief Justice Waite in *Gold Washing & Water Co. v. Keyes*:

> "The office of pleading is to state facts, not conclusions of law. It is the duty of the court to declare the conclusions, and of the parties to state the premises."

It may also be observed that the slightest inspection of the postal laws of the United States will make it apparent that Congress never entertained the idea, which is advanced here, that the United States mails must be carried by the railroads in the same way that they must build fences under police regulation.

In *Price v. Railway Company*, 113 U. S. 218, where Section 4000 of the Revised Statutes, upon which counsel rely most, was pleaded and relied on, this Court assumed that the service was being rendered in pursuance of a contract. The suggestion of counsel in argument, or otherwise, contrary to the settled practice of the government from the beginning, cannot be considered as making a suit arising under the law of the United States. It was said by the Court in *Western Union Tel. Co. v. Ann Arbor Railroad Company*, 178 U. S. 239, 244, that a claim under a statute contrary to

the settled construction of the statute would not be recognized as a basis of jurisdiction. The only deduction to be made by the Court from this complaint is that the defendant was carrying the mail for the United States in pursuance of a contract, made conformably to the statutes and postal regulations of the United States; that by reason of some failure in performance of the duty imposed by that contract the plaintiff suffered a loss, for which he seeks compensation from the defendant under principles of general law.

POSTAL REGULATIONS ARE NOT "LAWS OF THE UNITED STATES."

6. Counsel for the plaintiff in error seem to claim that this is a suit arising "under the laws of the United States" because of the postal regulations referred to. Whatever the effect of those regulations might be, is it permissible to construe the words "laws of the United States" as used in the Judiciary Act, so as to embrace all the regulations of all the departments of government, including the rules of the courts? Are they "laws of the United States" in that sense? It would seem not because they are clearly distinguished from those laws as to their origin, scope and function. Rules and regulations of every department are administrative. They may be involved in litigation, as the decisions cited by counsel show, but no right or title can be derived thence. Would it not be a practical absurdity for one to assert title to lands derived through the rules and regulations made by the Secretary of the Interior? Certainly he must go deeper than that. It is impossible to suppose that such regulations can ever have the effect of conferring any "right, title, privilege or immunity" which may form the basis of the jurisdiction of the Circuit Court of the United States. Such must be traced to the Constitution or the acts of Congress. I have not found any warrant for this claim in the decisions cited by counsel. These regulations may well have sometimes and for certain purposes the force of law, without coming within the definition of laws of the United States, as used in the Judiciary Act. Certainly no case has been found where jurisdiction was based on such regulations.

But claims made in argument, of whatever value they may be, cannot be considered by the court on this question because the Cir-

cuit Court did not acquire jurisdiction on any such claims or grounds. *Loeb v. Columbia Township Trustees*, 179 U. S. 472; *American Sugar Refining Co. v. New Orleans*, 181 U. S. 277; *Huguley Mfg. Co. v. Galeton Cotton Mills*, 184 U. S. 290. By these decisions, as before stated, the consideration of the question must be confined to the complaint because upon that the Circuit Court acquired jurisdiction, and it has been held by this Court in other decisions that the record cannot be enlarged by argument for the purpose of making out a federal question which does not otherwise clearly appear. *St. Joseph v. Steele*, 167 U. S. 659. Citing *Hanford v. Davies*, 163 U. S. 273, 279.

7. There are many other cases arising out of the mail service in one way or another which come quite as close to presenting a federal question as this. There is a case now pending against this same defendant, in the district court of North Dakota, where the plaintiff charges negligence in the construction and maintenance of certain steps used to hang the mail sack on the mail crane at one of the stations in North Dakota, by reason of which the mail carrier, in the performance of his duty, was injured. There have been several cases founded on injuries caused by the discharge of mail sacks by mail agents while the train was in motion. There have been many cases growing out of injuries to railway mail clerks in collisions. Not long since an action arose in Wisconsin growing out of alleged negligence of the mail contractors in the City of Milwaukee, who undertook to carry mail from the post office to the railways. Incident to this duty was the carriage of the mail clerk. He received personal injuries by reason of the alleged failure of the contractors to furnish safe horses and driver. *Lawton v. Waite*, 103 Wis. 244. We might suppose cases arising from the negligent driving of the United States mail wagons through the streets of cities. The injuries forming the basis of such suits must be considered as growing out of the mail service, and incident to that service. All such cases stand as closely related to the Constitution and laws of the United States as does the case at bar. But that relation is remote and not immediate. In order to bring any case within the rules so clearly laid down by this Court in the decisions cited, the relation between the suit and the law or the Constitution must be direct and primary. Take for instance the case of *Teal v.*

Felton, 12 How. 284. There the postmaster, being charged with a wrong in that he refused to deliver a newspaper, justified his refusal by appealing to the act of Congress which made it unlawful to place upon any newspaper any writing other than the address. His defence was that this newspaper contained such writing. It is plain that upon the construction of that statute the case must turn for the plaintiff or the defendant. But suppose his defence had been simply a denial of the wrong charged upon him. The fact that he was a postmaster and that he held his office by virtue of the Constitution and laws of the United States would not affect the issue between the parties in the slightest degree. So, here, it is admitted, in fact the Court would take judicial notice of so open and notorious a fact, that the railroads of this country carrying the mail, are carrying it as an aid in the discharge of this great function of government, and so under the laws of the United States. But how does this affect the issue of negligence between the parties, or of rights under the contract?

8. But it may be said that the question of the relation of the defendant to the government, which was made one ground of the decision of the Circuit Court, and the only ground on which the Circuit Court of Appeals planted its decision, is a federal question, and therefore this is a suit arising under the Constitution or laws of the United States. But the plaintiff does not assert any right based upon the proposition that defendant in its capacity of mail carrier was an agency of government, and *for that reason* liable to it for the loss. On the contrary, it is apparent from the complaint that plaintiff relied wholly upon general principles of law covering actions in tort or for breach of contract. The plaintiff's case is as much based upon these general principles of law as if the suit were against an express company for the loss of a package of money. From an inspection of the complaint it cannot be said that this was one of the grounds upon which the Circuit Court acquired jurisdiction. Every averment of the complaint is to the contrary. This was the defendant's claim, made in its argument on the demurrer, and was adopted by the court in its decision, precisely as the defenses which involved the federal questions were projected into the case of *Loeb v. Columbia Township Trustees*, 179 U. S. 472.

But assume, for the argument's sake, that plaintiff in error has a right to rely upon this ground of the decision of the Circuit Court of Appeals. It must be asked, how does the decision of this question call for any construction or application of the Constitution or laws of the United States within the rules? Is there a real or substantial dispute as to the effect or construction of the Constitution or some law of the United States involved in the decision of this question? If so, of what clause of the Constitution or of what law of Congress? It is true that there would be no officer or agency of the federal government if there were no such government, and but for the Constitution there would not be. It is also self-evident that if the Constitution had not empowered Congress to establish post offices and post routes, or if Congress had made no laws in pursuance of that authority, the defendant could not have been employed as an agency of government. There is certainly no dispute between the parties as to this, and no amount of reflection or disertation of this sort could aid or hinder plaintiff's cause. Admit it all, as we must, and we are just as far removed from the real, substantial question as ever. The answer of the question raised by the defense cannot be deduced from federal law as such, but must be referred to the principles of general law, as applicable to one government as to another. The mere fact that the defendant was an officer or agent of the United States would have no weight in determining whether the suit was one arising under the law of Congress. It must be shown that the officer or agent claimed to be acting under the authority of a law of Congress. Such a case was *Teal v. Felton*, 12 How., 284. The defense of the postmaster was that he was acting under authority conferred by a specific law of Congress. Of course, that made a suit arising under the law of the United States. The same is true of the recent case of *School of Magnetic Healing v. McAulty*, 187 U. S. 94.

AUTHORITIES CITED BY COUNSEL FOR PLAINTIFF IN ERROR IN SUPPORT OF JURISDICTION.

(Their Brief, p. 15).

I will briefly review the authorities cited in support of the jurisdiction claimed here.

Howard v. United States for the use of Stewart, 184 U. S. 676,

was an action brought on the official bond of the Clerk of a United States court, to recover for default of duty of the clerk. It was held that because the bond was taken by the Circuit Court in conformity with the Statutes of the United States, and because the case depended on the scope and effect of the bond and the meaning of those statutes, therefore it was a suit arising under the laws of the United States.

In this case the court followed *Freibleman v. Packard*, 109 U. S. 421, 423, which was a suit on the official bond of a United States Marshal. There could not possibly be any suit arising more directly under the laws of the United States than this class of cases.

In *Robinson & Co. v. Belt*, 187 U. S. 41, no question of jurisdiction was raised or decided; nor in *Studebaker v. Perry*, 184 U. S. 258; nor in *Marande v. Texas Pacific Ry.*, 184 U. S 173. In the latter case the defendant was organized under an act of Congress. Of the same nature are *Amato v. Railway*, 144 U. S. 465, and *Railway v. Harris*, 158 U. S. 326. In these cases the court followed the *Railroad Removal Cases*, 115 U. S. 1, where the question was fully considered.

Bolles v. Outing Co., 175 U. S. 262, was an action to recover a penalty given under the copyright law, Revised Statutes, Section 4965. No question of jurisdiction was raised. *Brady v. Daly*, 175 U. S. 148, is like the last case referred to, brought under Section 4966 of the Revised Statutes. In this suit, like those on the official bonds, the plaintiff traced his right and title directly to a specific statute.

In *Auten v. United States National Bank*, 174 U. S. 125, 141, jurisdiction was upheld because a receiver of a national bank is an officer of the United States; so decided *In Re Chetwood*, 165 U. S. 443. For this reason it was held that a suit against him was one "arising under the laws of the United States." This decision was planted upon the same reason as *Sonnetheil v. Brewing Co.*, 172 U. S. 401, 404, which was a suit against the United States Marshal for acts done in his official capacity. Within the rule laid down by the Court it would seem that the question of jurisdiction is not finally settled by showing that the defendant is in fact an officer of the United States. The suit must be predicated upon some omission of duty which calls for a construction and application

of the statutes which define the official duty of every officer of the United States. The jurisdiction in every case must be decided by the well established principles laid down by the Court.

It was suggested in *Sonnethiel v. Brewing Co.* that if suits against corporations chartered by the Congress are suits arising under the laws of the United States, that with greater reason must it be considered that a suit against a marshal of the United States, not simply as marshal but for acts done in his official capacity, falls within the same category. It is not permitted us to question the authority of the decision in the *Railroad Removal Cases,* but it may be consistent with propriety to suggest that those cases are *sui generis* and that all other cases should be decided by the rules firmly established by the Court, and that those rules ought not to be satisfied by simply referring to the *Railway Removal Cases* as a precedent in support of the jurisdiction asserted under such facts as are presented by the case at bar, or any like case. It is perfectly competent for the Congress in creating a railway, bank or other corporation to provide the jurisdiction in which it may sue or be sued as such, as it was provided in the act creating the United States Bank, for that bank had the right to sue in the United States Courts expressly given by the act creating it, and it was not necessary to consider its status under general principles. Under the Act of March 3, 1875, the Circuit Courts of the United States were given jurisdiction over all suits by or against National Banks, but by Section 4 of the Act of March 3, 1887, such banks are made citizens of the states in which they are located and the jurisdiction of the United States courts is limited to such as they would have over suits between individual citizens of the same state.

The reasoning in the *Removal Cases,* in short, is this: the corporation derives its being from the United States Statutes and, therefore, every suit by or against it must be a suit "arising under the law of the United States," although the only issue between the parties is one of common law negligence, as in the case of *Amato v. Railway,* 144 U. S. 465.

The paintiff in error here, in a loose sort of a way, relies upon the same reasoning, but the decisions are not close enough to serve as precedents and it must be said, with all due respect, that the reasoning upon which they are based seems to be out of harmony

with the well settled principles of construction now so firmly settled by the decisions cited and quoted from *supra*, and that it ought not be extended to any new class of cases in which the relation between the suit and the law of Congress is remote and not direct.

In *McFadden v. Evans, Snider, Buel Co.*, 185 U. S. 505, there was no question of jurisdiction.

It must be said that the cases cited, as a whole, make it quite plain that the case at bar cannot properly be included among them as a like case, but must be referred to the class of cases considered *supra*, where the jurisdiction of the court was denied.

CONCLUSION.

9. In conclusion it is to be observed that not every suit which springs out of facts related to the authority of the United States or to the Constitution or laws thereof, regardless of the nature of that relation, may be said to be a suit arising under the Constitution or laws of the United States. As for example, *Metcalf v. Watertown*, 128 U. S. 586, where it was held that a suit brought to recover a judgment of a United States court does not come within its jurisdiction; *Mail Company v. Flanders*, 12 Wall. 130, a suit instituted in the Circuit Court of the United States growing out of the sale of a vessel captured within the Confederate lines and sold under the "Captured Property Act" during our Civil War. It was claimed by the defendant that the Court had no jurisdiction because the Court of Claims had exclusive jurisdiction under the act of Congress, but this Court, referring to the question of jurisdiction, said:

> "Captured as the steamer Laurel Hill was, within the military lines of the Confederate army, the proclamation of our commanding general, before referred to, afforded no support to that part of the claim of the complainants, but the presiding justice being of the opinion that the Circuit Court had no jurisdiction of the case, did not examine the merits of the controversy. Both parties, as appears on the face of the pleadings, are citizens of the same State, and upon that ground this Court is of the opin-

ion that the bill of complaint was properly dismissed for want of jurisdiction."

Albright v. Teas, 106 U. S. 613, where it was held that the court had no jurisdiction in a suit to collect a consideration for the transfer of a patent, and of the same import is *Hartzell v. Tilghmann,* 99 U. S. 547; or in a similar suit as to copyright, *Little v. Hall,* 18 How. 165; *St. Joseph etc., Ry. v. Steele,* 167 U. S. 659, where the question involved the taxes on a bridge built under the authority of an act of Congress, no federal question was involved because it was not claimed that the plaintiff was entitled to an exemption under the act of Congress so authorizing the building of the bridge. The case already cited and frequently referred to, *Gold Washing & Water Co. v. Keyes,* 96 U. S. 199, is a case clearly belonging to this class.

This question was most thoroughly considered by the Court in *Blackburn v. Portland Gold Mining Co.,* 175 U. S. 571, and in *Shoshone Mining Co. v. Rutter,* 177 U. S. 505, in which most, if not all, the cases applicable are reviewed, and it was there decided that suits apparently having a much more direct relation to the laws of Congress than the case at bar were not suits arising under those laws within the settled rules of construction.

In *Western Union Telegraph Company v. Ann Arbor R. R. Co.,* 178 U. S. 239, a suit for the specific performance by defendant of a contract made with its predecessor under which plaintiff claimed certain rights covering the operation of its telegraph line on the railroad property, it was alleged in the bill as follows:

"Your orator is now and long has been doing an extensive telegraph business in many parts of the United States. On January 7, 1867, it filed with the Postmaster General its acceptance of the provisions of the act of the United States, passed July 24, 1866.

"7th. It avers that the provisions of the contract with said Frankfort and South Eastern Railroad Company are binding on said Ann Arbor Company, and that independent of said contract it has a right to maintain its telegraph line on what was formerly said Frankfort and South Eastern Railroad under the provisions of the

statute of the United States." (178 U. S. pp. 240-241).

It was claimed by the defendant that these facts made the suit one "arising under the laws of the United States" and this view was taken by the Circuit Court and Circuit Court of Appeals, but this Court held that the averments of the bill were insufficient.

In *Gableman v. Peoria, etc. Ry. Co.*, 179 U. S. 335, the question was presented whether a receiver, solely because he was appointed by the Federal court, had a right to remove a suit brought against him as one "under the constitution or laws of the United States." This court answered that question in the negative on the authority of *Bausman v. Dixon*, 173 U. S. 113; *Pope v. Railway Company*, 173 U. S. 573; *McKenna v. Simpson*, 129 U. S. 506; *Provident Savings Society v. Ford*, 114 U. S. 635.

The only case growing out of the mail service of a similar nature is that of *Price v. Railway Co.*, 113 U. S. 218, which was to recover for the death of a railway mail clerk while on duty. It was there contended on behalf of the plaintiff that the statutes of the United States under which it was claimed the clerk was rightfully on the train in the discharge of his duty, furnished the basis for the jurisdiction of this Court, but it was held that there was no federal question involved and the writ of error was dismissed. Mr. Justice Miller, delivering the opinion of the Court, used this language:

> "The person thus to be carried with the mail matter, without extra charge, is no more a passenger because he is in charge of the mail, nor because no other compensation is made for his transportation, than if he had no such charge, nor does the fact that he is in the employment of the United States, and that the defendant is bound by contract with the government to carry him, affect the question. It would be just the same if the Company had contracted with any other person who had charge of freight on the train to carry him without additional compensation. The statutes of the United States which authorize this employment and direct this service do not, therefore, make the person so engaged a passenger, or deprive him of that char-

> acter in construing the Pennsylvania statute. Nor does it give to persons so employed any right as against the railroad company, which would not belong to any other person in a similar employment, by others than the United States. We are, therefore, of opinion that no question of federal authority was involved in the judgment of the Supreme Court of Pennsylvania, and the writ of error is accordingly dismissed."

It would seem, therefore, that this is not a suit arising under the Constitution or laws of the United States, and that this Court is without jurisdiction to review the decision of the Circuit Court of Appeals.

II.

THE MERITS OF THE CASE.

1. Prior to this suit and another like it recently decided by the Supreme Court of Iowa, to which reference will be made hereafter, there had been but few cases in the courts involving the liability of carriers of the mail, and but one in which a railway company was defendant, so far as I know.

Central R. Co. of Ga. v. Lampley, 76 Ala. 357.

Prior to this there were two decisions taking quite opposite views on the question involved. The first case was

Conwell v. Voorhees, 13 Ohio 523,

which was very ably argued by counsel, as shown by their briefs in the reported case. There the suit was brought against the mail contractor to recover for the loss of a package containing bank bills, through the alleged negligence of the mail driver. It was decided that the contractor was a public agent, and as such not liable, except for his own neglect.

Sawyer v. Corse, 17 Gratt. 230, involved precisely the same question, and the court came to the opposite conclusion—that the con-

tractor was not a public agent and was liable for the negligence of his driver.

The Ohio decision was followed in *Hutchins v. Brackett*, 22 N. H. 252, and the Virginia case in *Railway Company v. Lampley*, 76 Ala. 357, *supra*. The Ohio case was cited with approval in *Robertson v. Sichel*, 127 U. S. 508, in support of the non-liability of the collector of New York for the negligence of a subordinate.

The Supreme Court of Mississippi in *Foster vs. Meets*, 55 Miss. 77, upholds the doctrine of *Conwell vs. Voorhees*.

The first duty devolving upon the court, then, is to decide the legal status of the defendant as carrier of the mail. It is not held anywhere, I believe, that it is a common carrier, or can be charged as such.

The Virginia court says it is not a public agent, but still holds it charged with a public duty and liable to anyone of the public interested in the due performance of that duty. There is no difference between the claim of the paintiff in that case, and that of the suitors in the cases against postmasters. The postmaster is charged by reason of his official position, to perform certain duties to the public, and if he fails through his own negligence and a loss occurs, he is liable.

1 *Redfield on Negligence*, Sec. 321;
Angell on Carriers, Sec. 119;
Cooley on Torts, p. 458, 2nd Ed. 391, 1st Ed.;
Teal vs. Felton, 1 N. Y. (Comstock), 537;
S. C. Affirmed, 12 How. 136.

But postmasters are not liable for the negligence of assistants and clerks.

Keenan vs. Southworth, 110 Mass. 474;
Wiggins vs. Hathaway, 6 Barber 632;
Schafer vs. Lynch, 8 Watts 453;
Bolan vs. Williamson, 2 Bay 551, So. Carolina.

The following cases,

Bishop vs. Williamson, 11 Me. 495;
Churtz vs. Smith, 23 Vt. 663;
Colman vs. Frazier, 4 Richardson (So. Carolina)

seem to hold the postmaster liable for the negligence of an assistant or clerk, simply because the clerk was not sworn. But how the clerk could be held to be more or less a servant of the postmaster by the oath, I cannot perceive. This seems to have been expressly repudiated in one part of the opinion, in *Sawyer vs. Corse, supra,* but is recognized in another as of some moment. It must be admitted that the fact of an oath seems to be of consequence in *Keenan vs. Southworth,* and *Schafer vs. Lynch, supra.* But the paramount consideration stated in *Robertson vs. Sichel,* 127 U. S. 508, that it would be against public policy to hold a public official responsible for anything but his own act, would seem to eliminate the fact of an oath as controlling. Of course, if it can be shown that the absence of an oath was the proximate cause of the loss, then the officer would be charged for his personal fault in not having the clerk sworn. But courts must have an exaggerated view of the efficacy of an oath, to go upon any such theory,—especially to hold it conclusive evidence of negligence. The general object of an oath is to furnish a basis for penalties for a breach of duty. I am not aware that there is any penalty or punishment prescribed by statute for mere negligence. The Post Office Department has the power to impose fines on carriers of the mails for non-performance, such as delays, etc., and it may be that for any breach of the contract of carriage it could impose a suitable fine. But this method of discipline could not be affected by the absence of an oath.

By Act of June 8, 1872, it is provided that "Every person employed in the postal service shall be subject to all penalties and forfeitures for violation of the laws relating to such service whether he has taken the oath of office or not." Section 3832, U. S. Compiled Stat. 1901.

In *United States vs. Bellow,* 2 Brock. 280 (24 Fed. Cases, p. 1079, Case No. 14,563), it was held by Chief Justice Marshall, that any person engaged in carrying the mails or in caring for them is subject to all penalties for a breach of duty required of him, whether sworn or not.

Every person who undertakes to carry the mail, or to be custodian of it, thereby becomes *de facto* an agent of Government. Such seems to be the basis for the act of Congress quoted *supra* and more plainly of the following—from the same act. "Any person who

shall have taken charge of the mail and shall voluntarily quit or desert the same before he has delivered it into the postoffice at the termination of the route, or to some known mail-carrier, messenger, agent, or other employe of the Postoffice Department authorized to receive the same, shall be punishable by a fine of not more than five hundred dollars, and by imprisonment for not less than three months, nor more than one year."

So it must be assumed that every act in furtherance of the service is in reality an act of government; that the mail never leaves the possession of the government, and that all those who perform any duty with reference to it are agents of the government. Therefore, as held by the court below, "Carriers of whatever kind are the servants of the government—the hands which it employs in the performance of its functions." The position of the carrier, then, is analogous to that of the public official engaged in the mail service.

This question was considered by the learned Circuit Judge, whose opinion is in the record, pages 26-30. The reasoning of that opinion is very cogent, and much more satisfactory from the standpoint of public policy than the Virginia case, *Sawyer vs. Corse*, so much relied upon. The Circuit Court of Appeals adopted the views of the Circuit Court on this point and elaborated the reasoning. And the first important question is whether this Court will adopt the reasoning of the Virginia Court, followed by the Supreme Court of Alabama in *Railroad vs. Lampley*, or adopt the reasoning of the courts below, supported by *Conwell vs. Voorhees*, 13 Ohio, 523, *Hutchins vs. Brackett*, 22 N. H. 252, *Foster vs. Meets*, 55 Miss. 77, and the case of *Boston Insurance Company, vs. Chicago, Rock Island & Pacific Railway Company*, decided by the Supreme Court of Iowa since the decisions of the courts below in the case at bar, and reported in 92 N. W. Rep. 88.

This was a case precisely like the case at bar, so far as legal positions are concerned. The only difference in fact is that the registered package of money was lost by a fire caused by the alleged negligence of the railway employes. The defendant interposed a general demurrer to the complaint which was sustained by the trial court, and its decision was affirmed by the Supreme Court, in a very thorough and clear opinion. One of the grounds of the deci-

sion is the same as that of the Circuit Court of Appeals in this case, and upon substantially the same reasoning.

It is claimed by counsel in their brief, page 12, that in holding that the night operator as custodian of the mails under Section 713 of the Postal Regulations was an agent of government, the Circuit Court of Appeals disregarded the provision in that section that persons employed by the railroad companies to perform such service "Are agents of the companies and not employes of such service." It is true the night operator was not an employe of the government in the ordinary sense, and it is true in one sense that he was the agent of the defendant as well as its employe. But properly construed, does the regulation exclude the view of the court below that he was also the agent of the government? There would seem to be no reason why such a construction should be placed upon the regulation. But, however that may be, the determination of that question is judicial and not departmental. The courts must be free to decide it upon the principles of law applicable to it without embarrassment from this regulation, because all such regulations in their scope and effect are limited by law.

In this connection it is important to consider the decision of this Court in *Robertson vs. Sichel*, 127 U. S. 507. In principle it would be as much against the interests of the public service to uphold such actions as this as that against the collector. It is not too much to say that no railway company would undertake such a service on the same terms with such an additional burden of responsibility. They would practically stand back of such insurance companies as the plaintiff in error, and this would be an added inducement to a greatly increased use of the mails for transmitting money in large amounts. There would be no end of opportunity for fraudulent cases against the companies. They would never know the extent of their liability—only the sender would have that knowledge. The government itself is ignorant of the amount of money in any case. It may be a hundred one dollar bills, or a hundred fifty or one hundred dollar bills or larger. The government assumes no responsibility for its safety and cannot be held liable, for the reasons stated in *Robertson vs. Sichel*. But why should the government impose such a liability on its agents, especially under such conditions as exist here? There would be a multitude of claims and suits by private persons losing letters. They

need not be registered. In most of the cases cited supra they were not. It would only be necessary to prove that a letter was probably in the mail stolen or otherwise lost through any act of negligence, and no one could dispute the plaintiff as to the money enclosed. These considerations should have weight because the carrier must of necessity demand greater compensation than at present if such a liability is to be imposed. It would be contrary to sound principles of business and justice to refuse to pay more; and the added burden ultimately would be on the government, as it should be. Moreover the carrier would be entitled to know when money was to be sent and in what amounts, so that it could regulate its charges. If the courts are to impose the liability of express companies for moneys and other valuables lost in transporting the mails, then it follows as a business corrolary that the carrier will no longer consent to carry the mails blindly, but will demand that the system be changed so as to afford the protection which express companies have from knowledge. The use of the mails for transmitting large sums of money would become highly detrimental to the service. Nothing would be more wholesome than an act of Congress forbidding the sending of money by registered mail except in very limited amounts, and to and from non-money order offices only. It would remove practically the only serious menace to the mails from robbery and theft. It would make for the integrity of the service. Certainly if the court has any choice of positions these considerations of public policy should have weight. For it is not too much to say that the success of plaintiff in error here would be a positive injury to the mail service of the United States in every aspect. These considerations of public policy are equally applicable in the determination of the question which follows.

2. There was no relation existing between the parties which gave a right of action to the plaintiff against the defendant on the facts alleged.

In the arguments before the courts below there was a wide divergence of view between the parties to this controversy, as to the source of the obligation of the defendant in error, relative to the carriage of the mail. The plaintiff in error asserted that the obligation was imposed by law. The defendant in error claimed that it sprang from a contract between the government and itself. To

maintain its position the plaintiff in error relied upon the provision of the Constitution authorizing Congress to establish postoffices and post-roads, and certain provisions from acts of Congress and postal regulations relative to post-roads and carriage of the mail. Counsel claimed in substance, that the power conferred on Congress, to establish post-roads, carried with it the power to compel railway companies to carry the mail against their consent and at whatever compensation Congress or the postmaster-general might provide. It is not too much to say that if such a power exists as to railway companies using railways established as post-roads by act of Congress, it exists also as to everyone using any post-road, especially to all stage coaches and other public conveyances. The same act which declares that all railroads are established post-roads, also declares that all the waters of the United States, all canals and plank roads and other designated roads, shall be established post-roads, so long as the mail continues to be carried thereon. Also all letter carrier routes in free delivery towns and cities—R. S. 1878, Sec, 3964. By the act of March 1st, 1884, all public roads and highways, while kept up and maintained as such, are declared to be post-roads. (23 Stat. L. 3, Vol. 1, Supplement R. S. 2 Ed., page 423.)

No one could claim that a railroad is any more a public highway than the navigable waters and other highways, or that it is any more a post-road than they are. Therefore, whoever uses any highway which is a post-route or road, shall, if Congress so enacts, carry the mail, and for such compensation as Congress, or the postmaster-general shall allow. We must beg leave of counsel to dissent from their view of this clause of the Constitution. Potent as it is, it hardly furnishes authority for such an exercise of arbitrary power.

The argument of counsel would of necessity include a like power with respect to establishing postoffices. They must be built as well as established; operated as well as built. And can contractors and builders, postmasters and subordinates be impressed into service against their will, and have their compensation fixed by the postmaster-general? This provision of the Constitution cannot be so construed as to warrant any such legislation as claimed by counsel.

But we are not called upon to consider so grave a question as the validity of the exercise by Congress of such an assumed power because Congress has not used it.

An examination of the statutes will make it plain that counsel have been misled. After designating post-roads, or what shall be post-roads, the Revised Statutes provide as follows: Sec. 3965, "The postmaster-general shall provide for carrying the mail on all post-roads established by law, as often as he, having due regard of productiveness and other circumstances, may think proper." That authority is just as far-reaching to-day as it was when enacted. Shall he provide it by exercising a power exceeding that of the Czar of Russia? Manifestly not; he must proceed by the only rational method—through contracts.

Following this section are numerous provisions governing contracts for carrying the mails, and laying down specific rules and regulations for the postmaster-general in carrying out the broad power conferred upon him by Section 3965.

Chapter 10 of the Revised Statutes, beginning at page 777, is devoted to railway service exclusively, and is as follows:

> "Sec. 3997. The postmaster-general shall arrange the railway routes on which the mail is carried, including those in which the service is partly by railway and partly by steamboat, into three classes, according to the size of the mails, the speed at which they are carried, and the frequency and importance of the service, so that each railway company shall receive, as far as practicable, a proportionate and just rate of compensation, according to the service performed.
>
> "Sec. 3998. The pay for carrying the mail on any railway of the first class shall not exceed three hundred dollars per mile per annum; on any railway of the second class it shall not exceed one hundred dollars per mile per annum; and on any railway of the third class it shall not exceed fifty dollars per mile per annum; but if one-half of the service of any railway is required to be performed in the night time, the postmaster-general may pay twenty-five per centum in addition to the above maximum rates.
>
> "Sec. 3999. If the postmaster-general is unable to contract for carrying the mail on any railway route at a compensation not exceeding the maximum rates herein provided, or for what

he may deem a reasonable and fair compensation, he may separate the letter mail from the other mail, and contract, either with or without advertising, for carrying such letter mail by horse, express or otherwise, at the greatest speed that can reasonably be obtained, and for carrying the other mail in wagons, or otherwise, at a lower rate of speed.

"Sec. 4000. Every railway company carrying the mail shall carry on any train which may run over its road, and without extra charge therefor, all mailable matter directed to be carried thereon, with the person in charge of the same.

"Sec. 4001. All railway companies to which the United States have furnished aid by grants of land, right of way, or otherwise, shall carry the mail at such prices as Congress may by law provide; and until such price is fixed by law, the pastmaster-general may fix the rate of compensation.

"Sec. 4002. The postmaster-general is authorized and directed to adjust the compensation hereafter to be paid for the transportation of mails on railroad routes upon the conditions and at the rates hereinafter mentioned:

"First. That the mails shall be conveyed with due frequency and speed, and that sufficient and suitable room, fixtures and furniture, in a car properly lighted and warmed, shall be provided for route-agents to accompany and distribute the mails.

"Second. That the pay per mile per annum shall not exceed the following rates, namely: On routes carrying their whole length an average weight of mails per day of two hundred pounds, fifty dollars; five hundred pounds, seventy-five dollars; one thousand pounds, one hundred dollars; one thousand five hundred pounds, one hundred and twenty-five dollars; two thousand pounds, one hundred and fifty dollars; three thousand five hundred pounds, one hundred and seventy-five dollars; five thousand pounds, two hundred dollars, and twenty-five dollars additional for every additional two hundred pounds,

the average weight to be ascertained, in every case, by the actual weighing of the mails for such a number of successive working days, not less than thirty, at such times, after June thirtieth, eighteen hundred and seventy-three, and not less frequently than once in every four years, and the result to be stated and verified in such form and manner as the postmaster-general may direct.

"Sec. 4003. In case any railway company now furnishing railway postoffice cars shall refuse to provide such cars, such company shall not be entitled to any increase of compensation under the provision of the next section.

"Sec. 4004. Additional pay may be allowed for every line comprising a daily trip each way, of railway postoffice cars, at a rate not exceeding twenty-five dollars per mile per annum for cars forty feet in length; and thirty dollars per mile per annum for forty-five foot cars; and forty dollars per mile per annum for fifty-foot cars; and fifty dollars per mile per annum for forty-five to sixty-foot cars.

"Sec. 4005. The length of the cars required for such postoffice railway car service shall be determined by the postoffice department, and all such cars shall be properly fitted up, furnished, warmed, and lighted for the accommodation of clerks to accompany and distribute the mails."

Section 3999 completely refutes the construction put on Section 4000 that the defendant in error was bound to carry the mail, contract or no contract. If the position of counsel were true, a refusal by the company, to carry on the terms prescribed by the postmaster-general, would be met by a peremptory writ of mandamus from a federal court, not by horse carriage. It is manifestly impossible to suppose that Congress intended to enact Section 4000 with a construction placed on it by the English Courts inconsistent with the act of Congress as a whole, as claimed by counsel on pages 24-26 of their brief.

There is an allegation in the amended complaint, found at page 32, folio 53, of the printed record, that during all of the period re-

ferred to there was no contract of any kind between the defendant and the United States, concerning or providing for the carriage by the defendant of said mail, or any part thereof, or of the person in charge of said mail, upon or along its said line of railway, or any part thereof. The Circuit Court, in sustaining the demurrer to the amended complaint, said of this new allegation that it was overborne by specific statements of facts, showing the contrary. It is also a mere conclusion contrary to the statutes. For it must be presumed that the postmaster-general has acted in accordance wih the statutes, and entered into contract relations with this railway company for the carriage of the mail because there is no other way provided in the statutes. The method of making the contract is wholly immaterial.

The following cases clearly sustain this view:

Jacksonville Ry. vs. United States, 118 U. S. 626;
Railway Company vs. United States, 118 U. S. 235;
United States vs. Alabama Ry. Co., 142 U. S. 615;
Eastern Ry Co. vs. United States, 129 U. S. 391;
Minnesota Ry. Co. vs. United States, 24 Ct. Claims 350;
Texas & Pacific Ry. Co. vs. United States, 29 Ct. Claims 379;
Price vs. Railway, 113 U. S. 218.

We reach the conclusion, therefore, that the duty to carry is one arising out of contract, and not one imposed by law.

As an incident of that contract, the defendant was required to receive the mail pouch at Harvey and deliver the same into the postoffice. It was also its duty, as an incident of the contract, to take reasonable care of the pouch, to protect it and its contents from loss or injury while in its possession. There is nothing in this complaint which charges anything but a breach of this contract. So whether the defendant was a public agent in the performance of a public duty, answerable only for its own negligence, or was acting purely in a contract relation with the government, it was answerable to the government alone for any breach of its contract—certainly not to the plaintiff, who stands in no relation of privity to it.

National Bank vs. Grand Lodge, 98 U. S. 123;
Kellar vs. Ashford, 133 U. S. 610;
Constable vs. National S. S. Co., 154 U. S. 51;
Electric Co. vs. U. S. Fidelity Co., 85 N. W. 648-650; Wis
Vrooman vs. Turner, 69 N. Y. 280;
Burton vs. Larkin, 13 Pacific Rep. 397-8 (Kansas);
Parker vs. Jeffrey, 37 Pac. Rep. (Ore.) 712;
Thomas Co. vs. Bathe, 44 S. W. (Ore.) 218;
Anderson vs. Fitzgerald, 21 Fed. Rep. 297;
Austin vs. Seligman, 18 Fed. Rep., 519;
Montgomery vs. Spencer, 50 Pac. Rep. (Utah) 623;
Wright vs. Terry, 2 S. Rep. (Fla.) 6;
Jefferson vs. Asch, 53 Minn. 446;
Germania Savings Bank vs. N. W. Motor & Light Co., 104 Iowa 717.

The foregoing cases are cited to the general principles governing the right of a stranger to a contract to bring an action on the ground that he is a beneficiary under it.

In *National Bank vs. Grand Lodge*, 98 U. S. 123-124, this court, referring to the contract between the Masonic Hall Association and the Grand Lodge, said: "It was a contract made for the benefit of the association and of the Grand Lodge,—made that the latter might acquire the ownership of stock of the former, and that the former might obtain relief from its liabilities. The holders of the bonds were not parties to it, and there was no privity between them and the lodge. They may have had an indirect interest in the performance of the undertakings of the parties, as they would have in an agreement by which the lodge should undertake to lend money to the association, or contract to buy its stock to enable it to pay its debts; but that is a very different thing from the privity necessary to enable them to enforce the contract by suits in their own names. We do not propose to enter at large upon a consideration of the inquiry how far privity of contract between a plaintiff and defendant is necessary to the maintenance of an action of assumpsit. The subject has been much debated, and the decisions are not all reconcilable. No doubt the general rule is that such a privity must exist. But there are confessedly many exceptions to it. One of them, and by far the most frequent one, is the case where, under a contract between two persons, assets have come to the promisor's

hands or under his control which in equity belong to a third person. In such a case it is held that the third person may sue in his own name. But then the suit is founded rather on the implied undertaking the law raises from the possession of the assets, than on the express promise. Another exception is where the plaintiff is the beneficiary solely interested in the promise, as where one person contracts with another to pay money or deliver some valuable thing to a third. But where a debt already exists from one person to another, a promise by a third person to pay such debt being primarily for the benefit of the original debtor, and to relieve him from liability to pay it (there being no novation), he has a right of action against the promisor for his own indemnity; and if the original creditor can also sue, the promisor would be liable to two separate actions, and therefore the rule is that the original creditor cannot sue. His case is not an exception from the general rule that privity of contract is required. There are some other exceptions recognized, but they are unimportant now."

This case is cited in *Kellar vs. Ashford*, 133 U. S. 610; in *Johns vs. Wilson*, 180 U. S. 440, and in *Constable vs. National S. S. Co.*, 154 U. S. 51. The latter case was an action to recover for the loss by fire of certain merchandise on the docks at New York, which had been delivered under a rule established by the Collector of Customs which in terms bound the Steamship Company to pay the consignees the value of a cargo so placed on the wharf if burned, etc., and reliance was had upon this provision in the rules of the port. This court said with reference to the action, page 73: "It is by no means a universal rule that a person may sue upon a contract made for his benefit, to which he was not a party." The right of the plaintiff to rely upon such a provision was denied.

In *Austin vs. Seligman*, 18 Fed. 519, 522, Judge Wallace, rendering the decision, said: "According to good sense and upon principle there is no reason why a person may not maintain an action upon a contract, although not a party to it, *when the parties to the contract intend tha he may do so.*" And again: "If the parties choose to treat him as a primary party in interest, they recognize him as a privy to the consideration and promise. And the result of the better considered decisions is that a third person may enforce a contract made by others for his benefit, whenever it is manifest

from the nature of the agreement *that the parties intended to treat him as the person primarily interested."*

> "The cases of *Hendricks vs. Lindsay* (93 U. S. 143) and *National Bank vs. Grand Lodge* (98 U. S. 123) and the expressions in the opinions do not antagonize upon this proposition but accord with it. The language of Folger, J., in *Simson vs. Brown,* 68 N. Y. 355, may be adopted as a correct and accurate statement of the law, as follows: 'It is not every promise made by one to another from the performance of which a benefit may inure to a third, which gives a right of action to such third person, he being neither privy to the contract nor to the consideration. The contract must be made for his benefit *as its object,* and he must be the party intended to be benefited.' "

Within these principles the right to maintain the action in that case was denied.

In *Anderson vs. Fitzgerald,* 21 Fed. 297, after a discussion of the principles governing such cases by Judge Love, of the Iowa District Court, the right of the sub-contractor for building of a railroad to sue on the contract between the Company and the principal contractor was denied, although it contained provisions which would inure to his benefit, the Court distinctly following *National Bank vs. Grand Lodge, supra.*

In the case of *Vrooman vs. Turner,* 69 N. Y. 280, which is a case frequently cited, there is a very full discussion of the subject, also in many other cases cited supra, but it is not considered necessary to more than refer to them. It is safe to say, however, that in none of them is there any warrant whatever for the claim put forward here by the plaintiff in error.

I desire to call the special attention of the court to a series of cases growing out of the loss of property by the failure of waterworks companies to keep their agreement with the municipalities to furnish water for putting out fires, which seem to be more closely analogous to the case at bar than any others.

Davis vs. Clinton Water Works Co., 54 Iowa 59;
Becker vs. Keokuk Water Wors, 79 Iowa 419;
Howsman vs. Trenton Water Works Co., 24 S. W. (Mo.) 784;
Mott vs. Cherryvale Water Co., 48 Kan. 12; 28 Pac. Rep. 989;
Fitch vs. Seymour Water Co., 37 N. E. Rep. 982;
Fowler vs. Athens Water Co., 83 Ga. 219; 9 S. E. Rep. 673;
Ferris vs. Carson Water Co., 16 Nev. 444;
Britton vs. Water Works Co., 81 Wis. 48;
Boston Safe Deposit Co. vs. Salem, 94 Fed. Rep. 238.

Davis vs. Clinton Water Works Co., 54 Iowa, 59, was an action to recover the value of certain buildings destroyed by fire upon the ground that the defendant was bound by contract with the city of Clinton to supply water to be used in extinguishing fires and failed to perform its obligation in this respect which resulted in the destruction of plaintiff's property. It was alleged in the petition that the buildings were burned because the necessary supply of water was not furnished by the defendant, and a sufficient pressure of water was not found at the hydrants contiguous to the buildings, which was caused by defective machinery and the negligence of defendant's servants. A demurrer to the petition was overruled and the defendant appealed. In passing upon this question the court said:

> "The petition does not allege or show any privity of contract between plaintiff and defendant. The plaintiff is a stranger, and the mere fact that she may find benefits therefrom by the protection of her property, in common with all other persons whose property is similarly situated, does not make her a party to the contract, or create a privity between her and de-defendant.
>
> "It is a rule of law, familiar to the profession, that a privity of contract must exist between the parties to an action upon a contract. One whom the law regards as a stranger to the contract cannot maintain an action thereon. The rule is founded upon the plainest reasons. The contracting parties control all interests, and are entitled to all rights secured by the contract. If

mere strangers may enforce the contract by actions, on the ground of benefits flowing therefrom to them, there would be no certain limit to the number and character of actions which would be brought thereon. Exceptions to this rule exist, which must not be regarded as abrogating the rule itself. Thus, if one under a contract receives goods or property to which another, not a party to the contract, is entitled, he may maintain an action therefor. So the sole beneficiary of a contract may maintain an action to recover property or money to which he is entitled thereunder. In these cases the law implies a promise on the part of the one holding the money or property to account therefor to the beneficiary. Other exceptions to the rule resting upon similar principles, may exist. See *National Bank vs. Grand Lodge*, 98 U. S. 123.

"The case before us is not an exception to the rule we have stated. The city, in exercise of its lawful authority, to protect the property of the people, may cause water to be supplied for extinguishing fires and for other objects demanded by the wants of the people. In the exercise of this authority it contracts with defendant to supply the water demanded for these purposes. The plaintiff receives benefits from the water thus supplied in common with all the people of the city. These benefits she receives just as she does other benefits from the municipal government, as the benefits enjoyed on account of improved streets, peace and order enforced by police regulation, and the like.

"It cannot be claimed that the agents or officers of the city employed by the municipal government to supply water, improve the streets, or maintain good order, are liable to a citizen for loss or damage sustained by reason of the failure to perform their duties and obligations in this respect. They are employed by the city, and responsible alone to the city. The people must trust to the municipal government to enforce the discharge of duties and obligations by the officers

and agents of the government. They cannot hold such officers and agents liable upon contracts between them and the city."

The Davis case was followed in *Becker vs. Keokuk Water Works*, 79 Iowa, 419, in which it was said:

> "The demurrer contains several grounds, only one of which, however, is so fully set out as to require examination. That is, in substance, that the petition fails to show a privity of contract between plaintiff and defendant. The chief question raised by the demurrer was considered in *Davis vs. Water Works Co.*, 54 Iowa, 59, and decided adversely to the claim now made by plaintiff. But he contends that this case differs from that in several material particulars. In this case a special fund was raised by the city to pay for a sufficient supply of water for use in case of fire, and to that fund plaintiff contributed. It is said that in making the contract, and in levying and collecting the taxes required by its provisions, the city acted as a mere agent. We do not think the fact that the city levies and collects a tax to be paid to defendant creates any privity of interest between defendant and the taxpayers. In making the contract, the city discharged one of the duties for which it was created; and in raising the required money it only provided the consideration due from it by virtue of the contract. It will hardly be claimed that defendant could proceed against the taxpayers, in the first instance, for any unpaid money due under the contract from the city."

The case of *Howsman vs. Trenton Water Works Co.*, 24 S. W. (Mo.), 784-786, was an action begun by a property owner against the water company for damages in failure to furnish water under a contract with the city, by reason of which the plaintiff's property was destroyed. In passing upon the company's liability under its contract with the city, the court said:

> "The case in hand is on the contract made by the water company with the town of Trenton, and

> the only feature that it presents that can take it out of the principle of law contained in these cases is, that provision was made in this contract for a special tax to be raised to provide part of the consideration the water company was to and did receive to which the plaintiff contributed, and an express promise contained in the contract that 'should said water company from lack of water supply or any other cause, except providential or unavoidable accident, fail to furnish a reasonable or adequate supply of water to extinguish any fire, then it shall be liable for all damages occasioned by such fire or neglect,' the argument being that here is an express promise of indemnity in a contract to which the plaintiff is privy to the consideration at least."

After reviewing the authorities, the court continued:

> "The town of Trenton under its charter has power to pass ordinances to prevent and extinguish fires, and, as incident thereto, power to contract for a supply of water for that purpose, but it would seem under the authorities cited, the plaintiff cannot maintain this action for cogent reasons which have been and may be put in several ways.
>
> "First. Although it was within the power of the town by contract to supply water for the purpose of extinguishing fires, it did not owe the duty of extinguishing fires to the plaintiff; consequently, the case is not brought within the line of adjudicated cases which maintain an exception to the rule that suit upon a contract must be brought by a party to the contract in cases where the promisee owed a duty to the third party which the promisor undertook to perform.
>
> "Second. A municipal corporation, in making contracts for the benefit of its citizens, acts for them collectively and for all of them in every act, and the relation of privity is not and cannot be introduced into such contracts by reason of tax paying or the discharge of any civic duty by any individual citizen.

"Third. The benefit to be conferred upon the individual citizen by the contract is incidental to the contract, the primary object of which is the benefit of all the citizens in their corporate capacity.

"Fourth. It does not clearly appear that the benefit was intended for the citizens in their individual capacity, but may have been intended for the protection of the municipality, and in the absence of the express power in the municipality to make contracts for the indemnity of its individual citizens should be so construed.

"Fifth. The relation that the contractor sustained to the town was that of its agent or servant to carry out the obligation of the contract upon its part for the benefit of all the citizens of the municipality, and for the enforcement of the terms thereof the citizens must look to the authorities of the city and cannot individually maintain an action for breach of the contract.

"Sixth. The town has no authority to make a contract to indemnify the plaintiff for the loss of his property by fire resulting from the neglect of its agents or servants to furnish an adequate supply of water to put it out, and therefore could not make such a contract that would be binding on another."

In the case of *Mott vs. Cherryvale Water Co.*, 48 Kansas, 12; 28 Pac. Rep. 989, which was a case of fire loss because of breach of contract with a city in which the water company was required by the terms of ordinance under which it was operating to "pay all damages that may accrue to any citizen of the city by reason of a failure to supply a sufficient amount of water," etc, and the right to sue was denied, the opinion citing many like cases.

In *Fitch vs. Seymour Water Co.*, 37 N. E. Rep. 982, the Supreme Court of Indiana said that although the company had agreed specifically to do certain things which it failed to do, to the great damage of the plaintiff, that there was no privity of relation and the action could not be maintained. It was contended there, as here, that the obligation was not one of contract but one imposed by law, but this the court refused to adopt. This decision followed

the Iowa and Georgia cases and cited several other like cases, but commented with disapproval on *Paducah L. Co. vs. Paducah Water Co.*, 89 Ky. 340, said to be the only case of like nature holding the other way.

In *Fowler vs. Athens Water Co.*, 83 Ga. 219; 9 S. E. Rep. 673, the Supreme Court of Georgia, by Bleakley, C. J., said:

> "The present case is not based upon the breach of a statutory duty, but solely upon the failure to comply with a contract made with the municipal government of Athens. To that contract the plaintiff was not a party and the action must fail for the want of the necessary privity between the parties before the court. A case directly in point is *Davis vs. Water Works Co.*, 54 Iowa 59; see also *Nickerson vs. Hydraulic Co.*, 46 Conn., 24. There being no ground for recovery treating the action as one ex contractu, is it better founded treating it as one ex delicto? We think not. The violation of the contract entered into, the breach being one of mere omission or nonfeasance, is no tort to the private property of any individual, though he be a member of the community and a taxpayer to the government. Unless made so by statute, a city is not liable for failing to protect the inhabitants from destruction of property by fire. We are unable to see how a contractor with the city to supply water to extinguish fires, commits a tort by failing to comply with his undertaking, unless to the contract relation there is superadded a legal command by statute or express law. There was no error in granting the non-suit."

In *Ferris vs. Carson Water Co.*, 16 Nev. 444, the court, after discussing the principles, said: "The board of trustees of the town, in the exercise of a discretionary power conferred upon them by the legislature contracted for a supply of water for the extinguishment of fires. The plaintiff, in common with the other residents of the town, enjoyed the advantage of this contract. He had an indirect interest in the performance of the contract by the water company, as had all of the property-holders of the town, but such an interest is not sufficient to constitute the privity, either

directly or by substitution, which must exist in order to give him a right of action upon the contract."

In *Britton vs. Water Works Co.*, 81 Wis., every ground urged by the able counsel for the plaintiff in a like case was thoroughly considered by the court, speaking by Mr. Justice Orton, and the right of action was denied, the court declaring that to adopt the contention of the plaintiff would be to ingraft new and strange doctrines upon the well settled principles of the law.

In *Boston Safe Deposit & Trust Company vs. Salem*, 94 Fed. Rep. 238, Ricks, J., deciding against the right to maintain such an action, said:

> "The general doctrine held by the foregoing cases is that, where a city contracts with a water company to furnish a supply of water for use in extinguishing fires, such supply to be paid for by a levy of taxes upon the taxpayers of the city, there is no such privity of contract between a citizen or resident of such city and the water company as will authorize such resident or citizen to maintain an action against said water company for the injury or destruction of his property by fire caused by the failure of the water company to fulfill its contract; and this is held even where the ordinance granting the water company its franchise provides that the water company shall pay all damages that may accrue to any citizen of the city by reason of a failure on the part of such water company to supply a sufficient amount of water to put out fires. See *Mott vs. Manufacturing Co.*, and other cases cited supra. The only case in all the books where a water company has been held liable for failure to furnish sufficient water for the extinguishment of fires is the case of *Paducah Lumber Co. vs. Paducah Water-Supply Co.*, 89 Ky. 340, 12 S. W. 554, and 13 S. W. 249, in which case it was unnecessary for the court to have held this doctrine, as there was a private contract between the water company and the consumer for the furnishing of fire pressure. This Kentucky case has been repeatedly criticised by the courts of the various states in

which this question has been decided. See *Mott vs. Manufacturing Co., Britton vs. Waterworks Co., Fitch vs. Water Co., Howsman vs. Water Co., House vs. Waterworks Co., Waterworks Co., vs. Brownless,* and *Eaton vs Waterworks Co.,* cited supra."

And again:

"That a city owning its own waterworks cannot be held liable for failure to furnish sufficient water supply to extinguish fires is undisputed. 2 Dill, Mun. Corp. Sec. 975; *Wheeler vs. Cincinnati,* 19 Ohio St. 19: *Fowler vs. Waterworks Co.,* 83 Ga. 222, 9 S. E. 673; *Wainwright vs. Water Co.,* 78 Hun. 146, 28 N. Y. Supp. 987; *Tainter vs. City of Worchester,* 123 Mass. 311; *Vanhorn vs. City of Des Moines,* 63 Iowa, 447 19 N. W. 293; *Hayes vs. City of Oshkosh,* 33 Wis. 314; *Stone vs. Water Co.,* 4 Pa. Dist. R. 431; *House vs. Waterworks Co.* (Tex. Sup.) 31 S. W. 179, 185. If the city itself cannot be held liable for damage resulting from failure to furnish a fire pressure to its citizens, and if there is no privity of contract between the water company operating under a franchise from the city and the citizens or residents of such city, it is clear, upon principle as well as authority, that no legal obligation exists on the part of such water company and in favor of the individual citizen to maintain a sufficient pressure at the city water mains to extinguish fires which may occur upon the premises of such individual citizen."

Counsel has sought to avoid the difficulty of this aspect of the case by claiming that there was no contract, and further that even if there were that the statutes and regulations have still the effect which he claims. But it must be observed that they, being a part of the contract, could not be relied on independently of the contract. The breach of the contract is in reality the basis of the action, and the plaintiff was neither a party or privy to it.

Counsel claims that even within the decision of the Circuit Court of Appeals the defendant is liable because itself, as distinguished from its night agent, is well charged with negligence. But there is nothing to show that ordinary care was not used. What is suggested was such care as would amount to insurance of safety; at least extraordinary care. The regulation relied on by counsel, page 13 in their brief, requires the defendant to retain custody of mails delivered at night, "by placing the same in a secure and safe room or apartment of the depot or station until morning." In the complaint it is alleged, page 34 of Record, that the night agent received the mail sacks and deposited the same in the depot. Again on page 35 it is alleged that Soule or some unknown person, "did enter one of the rooms contained in said depot building where said mail sack or mail pouch had been placed by defendant's operator." These allegations show that the requirement of the regulation was complied with, except for the charge that the room was not safe enough to prevent a robbery. The complaint alleges fault alone in this, that the mail sack was not placed in "any *separate room, closet* or other *safe* receptacle, capable of being *securely* fastened against any intruder or unauthorized person, by lock and key or *otherwise.*" "That said room was not designed for or capable of safely keeping valuable articles or property." The regulation does not require "a separate room" but a "secure and safe room." Is it to be supposed that it was intended that the carrier should provide a room any more secure and safe than for property for which it was responsible as common carrier? Counsel has not alleged anything to show less care than was ordinarily bestowed on valuable freight at that station. It clearly appears from the complaint itself that the mail was properly placed, for it is alleged "That said Soule or other person, had no right of access to said room" (showing that it was not the public waiting room but the inner office) "but through the negligence of said defendant and its said night operator *did gain entrance to said room*" and further that the mail sack was "readily accessible to any person *gaining entrance* to said room." It is further alleged that the mail sack was wholly unprotected and unguarded by said night operator or otherwise *against* the person who had *gained access* to the room. What the complaint demands is in excess of the regulation and of the law. It requires such care that would successfully

resist all the machinations and violence of robbers. This is too much care for country railway stations. The railway companies would have to build fire proof and burglar proof rooms sufficient to thwart strategy and resist dynamite to meet the requirements suggested by plaintiff in error.

It is also claimed that the defendant itself is chargeable with negligence because the night agent was not sworn as required by law. But the regulations of Section 713, quoted on page 11 of their brief, expressly provide that such employees need not take the oath. Besides it cannot be assumed that the absence of the oath was the proximate cause of the loss.

It is respectfully submitted that, if the court assumes jurisdiction to review the decision of the Circuit Court of Appeals, the judgment should be affirmed.

ALFRED H. BRIGHT,

Counsel for Defendant in Error.

Supreme Court of the United States.

No. 141.—October Term, 1903.

Bankers Mutual Casualty Company, Plaintiff in Error, *vs.* The Minneapolis, St. Paul and Sault Sainte Marie Railway Company.	In error to the United States Circuit Court of Appeals for the Eighth Circuit.

[February 23, 1904.]

This action was originally brought in the Circuit Court of the United States for the District of Minnesota by the German State Bank of Harvey, North Dakota, for which the Bankers Mutual Casualty Company of Iowa was subsequently substituted as plaintiff, against the Minneapolis, St. Paul and Sault Sainte Marie Railway Company of Minnesota. The averments gave jurisdiction on the ground of diversity of citizenship. A demurrer to the original complaint was sustained for reasons stated by Lochren, J. 113 Fed. Rep. 417. Thereupon "an amended and substituted complaint" was filed, and on demurrer judgment was rendered in favor of defendant, and affirmed on error by the Circuit Court of Appeals for the Eighth Circuit. 117 Fed. Rep. 434. This writ of error was then allowed.

The amended complaint was as follows:

"That the Bankers Mutual Casualty Company, during all of the year A. D. 1900, and up to the present time, is and was a corporation, duly organized under the laws of the State of Iowa, and a citizen of said State, with its principal place of business at Des Moines, in said State, engaged in the business of insuring banks against loss from robbery and burglary, including the insurance against loss of packages of money, while in the course of transmission from place to place, while regularly carried in the United States registered mails.

"That defendant, during all of the year A. D. 1900, and up to the present time, is and was a corporation, duly organized under the laws of the State of Minnesota and a citizen of said State, with its principal place of business at Minneapolis, in said State, engaged in operating a line of railroad situated in the States of Minnesota and North Dakota.

"That the German State Bank, during all of the year A. D. 1900, and up to the present time, is and was a corporation, duly organized under the laws of the State of North Dakota, and a citizen of said State, with its principal place of business at the town of Harvey, in said State, engaged in a general banking business at said town.

"That during the whole year A. D. 1900, and up to the present time, defendant is and was engaged in carrying the United States mails between the terminal and intermediate stations located upon and along its said line of railroad, under and by virtue of the statutes and laws of the United States, and the regulations established by the Post Office Department of the

United States government, and in pursuance of a fixing of the compensation to be paid to defendant by the United States government for carrying said mails and the person in charge thereof, based upon the last preceding reweighing of said mails and upon notice in writing, in the usual form, from the Second Assistant Postmaster General of the United States, requiring defendant to carry said mails and the person in charge thereof.

"That said depot, at or near the town of Harvey, was an intermediate station on that part of defendant's said line of railroad within the State of North Dakota, which extends from the station at Hankinson to the station at Portal, and the railroad line between said stations at Hankinson and Portal is designated by and known to the Post Office Department of the United States, as railroad route No. 161,018, being a distance of 344.58 miles, and the compensation fixed by the United States Post Office Department to be paid annually by the United States to defendant during all of the period herein referred to for the carriage of said mails and the person in charge thereof is and was the sum of sixty-four thousand eight hundred and fifteen and 49/100 dollars ($64,815.49,) at the rate of $188.10 per mile.

"That this substituted plaintiff is not in possession of the aforesaid notice to defendant, and is unable to attach to this petition said notice or a true copy thereof.

"That during all of the period hereinbefore referred to there was no contract of any kind between defendant and the United States government concerning or providing for the carriage, by defendant, of said mails, or any part thereof, or of the person in charge of said mails, upon or along defendant's said line of railway or any part thereof.

"That on or about the 10th day of November, A. D. 1900, the Metropolitan Bank, a corporation organized under the laws of the State of Minnesota, was engaged in transacting a general banking business in the city of Minneapolis, in said State, and on or about said date said bank deposited in the United States mails, at Minneapolis, in said State, a package containing lawful money of the United States, commonly known and called currency, of the actual cash value of three thousand dollars, ($3,000.00,) in an envelope properly addressed to the German State Bank at Harvey, North Dakota, and prepaid thereon the postage and registration fee, and said package was thereupon duly registered by the postmaster of said post office. That from and after the time of depositing said package in said post office at Minneapolis, said package and its contents was the property of said German State Bank.

"That said registered package was covered by insurance and indemnity against loss while in transit through the United States mails from Minneapolis to said Harvey, under a policy of insurance issued by said Bankers Mutual Casualty Company, the substituted plaintiff, said insurance being for the use and benefit of said German State Bank. That a true copy of said policy is hereto attached as part hereof, and marked Exhibit 'A.'

"That on or about November 10th, A. D. 1900, and while said package was in good safety and prior to the departure of the train carrying said registered package, said Metropolitan Bank deposited in the United States mails, at the post office in said city of Minneapolis, a letter of advice, properly addressed to said Bankers Mutual Casualty Company at Des Moines, Iowa, with postage thereon prepaid; that said letter of advice notified said

Bankers Mutual Casualty Company, of the shipment by said Metropolitan Bank of said sum of three thousand dollars to said German State Bank of Harvey, and upon said mailing of said letter of advice, the contract of insurance and indemnity of said registered package of currency immediately attached thereto and became a valid and complete contract of insurance and indemnity by the said Bankers Mutual Casualty Company, in favor of said German State Bank.

"That in the regular course of transmission of the United States mails between the said city of Minneapolis and the said town of Harvey, said registered package was duly delivered by the post office officials of said city of Minneapolis to the railway mail clerk or other proper postal official, and placed in a railway mail car or other proper car, the property of defendant, then standing upon defendant's said line of railway, and was transported by defendant railway company to defendant's railway depot or station, situated in or near said town of Harvey, North Dakota.

"That prior to the arrival of said registered package at said town of Harvey, the same, together with other registered mail packages and other mail matter, was, by said railway mail clerk in charge of said mails, duly enclosed in a regular United States mail sack or mail pouch, which said mail sack or mail pouch was securely locked or fastened by the official government strap and lock.

"That from and after the time of the depositing of the mail sack containing said currency in defendant's mail car at Minneapolis, Minnesota, for the purpose of transit and transportation for delivery at Harvey, North Dakota, the same was under the exclusive care, custody and control of the postal clerks, regularly employed by the United States government and in charge of the mail in said car; that the mail sacks containing said registered package, from and after the time of its delivery in said postal car, to the proper postal clerks therein, up to and including the delivery of said mail sack at Harvey, North Dakota, was in the exclusive care, custody and control of the said postal clerks or authorities,

"That upon the arrival of defendant's said train and postal car at said town of Harvey, North Dakota, said railway mail clerk or other postal official, between eleven and twelve o'clock of said night, delivered said mail sack, duly locked, together with said registered package of currency therein contained, to one James Magson, the night station agent, or night operator of defendant at said town of Harvey; that said night station agent, or night operator, was not sworn as an official or employee of the Post Office Department of the United States government, as required by law, but was then and there employed and duly authorized by the defendant to receive and take charge of all mail matter received over defendant's said line of railway, at said town of Harvey, including the mail sack or mail pouch containing said package of currency, and to deposit same in defendant's depot, at Harvey, North Dakota, and did so receive, take charge of and deposit said mail sack or mail pouch.

"That defendant was not sworn as an official or employee of the Post Office Department of the United States government, and had not subscribed or sworn to any oath relating to or concerning the carriage of the United States mails, or the performance of defendant's duties as such carrier of the mails.

"That section 713 of the postal laws and regulations of the United States of the year A. D. 1893, which was in force at the time of the receipt

and transmission of said registered package is in words and figures as follows, to wit: 'The railroad company will also be required to take the mails from and deliver them into all intermediate post offices and postal stations located not more than eighty rods from the nearest railroad station at which the company has an agent or other representative employed.'

"That said post office at Harvey was an intermediate post office, and was located not more than eighty rods from defendant's railroad station, or depot, at or near said town of Harvey.

"That under said postal regulation it was the duty of said defendant to provide a sufficient and safe receptacle or place for the safety and security of said mail, while in its said custody, also to safely care for and guard said mail sack and its contents during the night, also to safely deliver the same to the postmaster or postmistress at the post office in said town of Harvey, North Dakota.

"But neglecting its said duty in the premises, defendant wholly failed and neglected to provide any receptacle or place for the safe or secure keeping of mail, and also failed to place a duly sworn official in charge of said mail sack, and further wholly failed to safely care for or guard said mail sack and its contents, and also wholly failed to safely deliver the same at the post office to the postmaster in said town of Harvey. That by reason of defendant's said negligence, some person, to this plaintiff unknown, in some manner not known to this plaintiff, obtained access to said mail sack and opened the same, and abstracted or took therefrom said registered package, whereby the same was wholly lost to said German State Bank.

"That one George A. Soule was then the road master or foreman employed by said defendant at said town of Harvey, or one of defendant's employees or servants, but was not sworn in as an official or employee of the Post Office Department, as required by law, and was not authorized or employed by defendant to take charge of said mail sack or to perform any duty in relation thereto and had no right of access to said mail sack, or to the mail therein contained, by virtue of his said employment by defendant.

"That said Soule had previously unlawfully obtained and caused to be made, a key to the United States government mail sacks or mail pouches, and personally, or with the aid and assistance of some person or persons, to this plaintiff unknown, did enter one of the rooms contained in the said depot building, where said mail sack or mail pouch had been placed by defendant's operator or night agent, on the floor or wall of said room, and not in any separate room, closet or other safe receptacle, capable of being securely fastened against any intruder or unauthorized person, by lock and key or otherwise. That said room was not designed for or capable of safely keeping valuable articles of property.

"That said Soule, or other person, had no right of access to said room, or to said mail sack or mail pouch, but through the negligence of defendant and its said night operator or night agent, as set forth in this complaint, did gain entrance to said room and obtain access to said mail sack or mail pouch, and the mail matter therein contained, and did find said mail sack or mail pouch situated or placed as above set forth, so that the same was readily accessible to any person gaining entrance to said room, and did find said mail sack or mail pouch wholly unprotected and unguarded by said night operator or otherwise.

"That said Soule, or other person, by reason of the aforesaid negligence of said defendant and its said night agent or night operator, did obtain access to said mail sack or mail pouch and did unlock the same and abstract and take therefrom the aforesaid registered package, containing said three thousand dollars ($3,000) in currency and did unlawfully convert the same to his use and benefit, and the same has never been delivered or returned to said German State Bank or to said Metropolitan Bank of Minneapolis, or to this plaintiff, the Bankers Mutual Casualty Company, or to any one for the benefit of any of them."

[Then followed averments of payment to the German State Bank by the Casualty Company under its policy of insurance; of demand on defendant for repayment, and refusal; of subrogation and assignment; and prayer for judgment.]

Mr. Chief Justice FULLER delivered the opinion of the Court:

If the jurisdiction of the Circuit Court depended entirely on diversity of citizenship, the judgment of the Circuit Court of Appeals was made final by the act of March 3, 1891, and this writ of error must be dismissed. But it is contended that jurisdiction also rested on the ground that the case arose under the Constitution or laws of the United States, and that must be tested by the settled rule that a suit does not so arise unless it really and substantially involves a dispute or controversy as to the effect or construction of the Constitution or some law or treaty of the United States, upon the determination of which the result depends, and which appears on the record by plaintiff's own statement of his case in legal and logical form, such as is required in good pleading. *Tennessee* v. *Banks*, 152 U. S. 454; *Arbuckle* v. *Blackburn*, 191 U. S. 405; *Defiance Water Company* v. *Defiance*, 191 U. S. 184; *Gold Washing Company* v. *Keyes*, 96 U. S. 199; *Starin* v. *New York*, 115 U. S. 248.

The amended complaint alleged that defendant was engaged in carrying the mails by virtue of the laws and postal regulations of the United States; that a registered package of currency was deposited in the mails, delivered to the mail clerk on the proper mail car belonging to defendant, duly enclosed with other mail matter in a securely locked mail sack, and transported by defendant to its station at Harvey; that the mail clerk between eleven and twelve o'clock at night delivered the mail sack duly locked and containing the registered package of currency to the night-station agent of defendant at the town of Harvey, who was duly authorized by defendant to receive and take charge of all mail matter received there on defendant's railway, neither defendant nor the station agent having taken the oath as officials or employees of the Post Office Department; and it was then averred:

"That section 713 of the postal laws and regulations of the United States of the year A. D. 1893, which was in force at the time of the receipt and transmission of said registered package, is in words and figures as fol-

lows, to wit: 'The railroad company will also be required to take the mails from and deliver them into all intermediate post offices and postal stations located not more than 80 rods from the nearest railroad station at which the company has an agent or other representative employed.'

"That said post office at Harvey was an intermediate post office and was located not more than 80 rods from defendant's railroad station, or depot, at or near said town of Harvey.

"That under said postal regulation it was the duty of said defendant to provide a sufficient and safe receptacle or place for the safety and security of said mail, while in its said custody; also to safely care for and guard said mail sack and its contents during the night; also to safely deliver the same to the postmaster or postmistress at the post office in said town of Harvey, North Dakota.

"But neglecting its said duty in the premises, defendant wholly failed and neglected to provide any receptacle or place for the safe or secure keeping of mail, and also failed to place a duly sworn official in charge of said mail sack, and further wholly failed to safely care for or guard said mail sack and its contents, and also wholly failed to safely deliver the same at the post office to the postmaster in said town of Harvey."

And further, that defendant's roadmaster entered the depot, unlocked the mail bag with a key he had unlawfully caused to be made, abstracted the package of currency and converted its contents; that the room where the mail bag was placed was "not designed or capable of safely keeping valuable articles or property," and that it was through the negligence of defendant and its station agent that the man gained entrance to the room and obtained access to the mail bag.

It will be perceived that plaintiff relied on principles of general law applicable to negligence, and to the liability of defendant if there were negligence, and nowhere asserted a right which might be defeated or sustained by one or another construction of the Constitution or of any law of the United States. The complaint did indeed deny that there was any contract between defendant and the government, but that was merely a conclusion of law, inconsistent with the statutes, and with the facts alleged. And whether the duty counted on was imposed by law, or arose from contract, the question remained whether defendant was a public agent of the United States and the consequences of that relation, and the construction of no provision of the Constitution or of any law of the United States on which the recovery depended was put in controversy.

In other words, no definite issue in respect of a right claimed under the Constitution or any law of the United States was deducible from plaintiff's statement of its case, and if the postal regulations could, under circumstances, be regarded as laws of the United States creating a right which might be denied or secured according to one construction or another, it did not appear that the construction of the extract from section 713 of those regulations was in any way in dispute or could have been. And the averments of the complaint cannot be helped out by resort to the other plead-

ings or to judicial knowledge. *Mountain View Company* v. *McFadden*, 180 U. S. 533; *Arkansas* v. *Kansas City Coal Company*, 183 U. S. 185.

The Constitution empowers Congress to establish post offices and post roads, and Congress has passed laws accordingly, pursuant to which defendant was carrying the mails. But the alleged cause of action was not referable to those laws or put on the ground that defendant was an officer or public agent of the United States. That was matter of defense and could not be and was not resorted to by plaintiff to obtain jurisdiction. *Tennessee* v. *Bank*, 152 U. S. 454.

A writ of error to the judgment of a State court stands on different ground. Such was *Teal* v. *Felton*, 12 How. 284, in which the postmaster relied on an act of Congress in defense, and the writ was properly granted under the twenty-fifth section of the judiciary act.

Cases against United States officers as such, or on bonds given under acts of Congress, or involving interference with Federal process, or the due faith and credit to be accorded judgments, are not in point; nor does the case fall within the ruling that a corporation created by Congress has a right to invoke the jurisdiction of the Federal courts in respect to any litigation it may have except as specially restricted. The doctrine of *The Removal Cases*, 115 U. S. 1, cannot be extended so as to embrace cases like the present. *Shoshone Mining Company* v. *Rutter*, 177 U. S. 505, 509.

On the other hand, such cases as *Provident Savings Society* v. *Ford*, 114 U. S. 635; *Metcalf* v. *Watertown*, 128 U. S. 586; *Colorado Mining Company* v. *Turck*, 150 U. S. 138; *St. Joseph Railway* v. *Steele*, 167 U. S. 659; *Pratt* v. *Paris Gas Light Company*, 168 U. S. 259; *Western Union Telegraph Company* v. *Ann Arbor Railroad Company*, 178 U. S. 239; *Gableman* v. *Peoria Railway Company*, 179 U. S. 335, show that suits though involving the Constitution or laws of the United States are not suits arising under the Constitution or laws where they do not turn on a controversy between the parties in regard to the operation of the Constitution or laws, on the facts.

In *Price* v. *Pennsylvania Railroad Company*, 113 U. S. 218, which was a writ of error to the Supreme Court of Pennsylvania, the question arose whether a railway mail clerk was a passenger within a certain statute of Pennsylvania, and Mr. Justice Miller, delivering the opinion, said:

"The plaintiff argues here, and insisted throughout the progress of the case in the State courts, that by reason of certain laws of the United States as applied to the facts found in the verdict of the jury, the decedent was a passenger, and the Supreme Court erred in holding otherwise. These laws are thus cited in the brief of plaintiff's counsel:

"'Act of March 3, 1865, § 8, 13 Stat. 506, provides that 'For the purpose of assorting and distributing letters and other matter in railway post offices, the Postmaster General may, from time to time, appoint clerks who shall be paid out of the appropriation for mail transportation.'

"'§ 4000 Rev. Stat. requires that 'every railway company carrying the mail shall carry on any train which may run over its road, and without extra charge therefor, all mailable matter directed to be carried thereon, with the person in charge of the same.'

"We do not think these provisions either aid or govern the construction of the proviso in the Pennsylvania statute.

"The person thus to be carried with the mail matter, without extra charge, is no more a passenger because he is in charge of the mail, nor because no other compensation is made for his transportation, than if he had no such charge, nor does the fact that he is in the employment of the United States, and that defendant is bound by contract with the government to carry him, affect the question. It would be just the same if the company had contracted with any other person who had charge of freight on the train to carry him without additional compensation. The statutes of the United States which authorize this employment and direct this service do not, therefore, make the person so engaged a passenger, or deprive him of that character, in construing the Pennsylvania statute. Nor does it give to persons so employed any *right* as against the railroad company, which would not belong to any other person in a similar employment, by others than the United States. We are, therefore, of opinion that no question of Federal authority was involved in the judgment of the Supreme Court of Pennsylvania, and the writ of error is accordingly dismissed."

Although that case was a writ of error to a State court it was held, in effect, that it was too obvious for controversy that the acts of Congress referred to did not give the mail clerk any particular right as against the railroad company in respect of negligence and therefore this court declined to entertain the writ.

We repeat that the rule is settled that a case does not arise under the Constitution or laws of the United States unless it appears from plaintiff's own statement, in the outset, that some title, right, privilege or immunity on which recovery depends will be defeated by one construction of the Constitution or laws of the United States, or sustained by the opposite construction. *Gold Washing Company* v. *Keyes*, 96 U. S. 199; *Starin* v. *New York*, 115 U. S. 248; *New Orleans* v. *Benjamin*, 153 U. S. 411; *Blackburn* v. *Gold Mining Company*, 175 U. S. 571; *Shoshone Mining Company* v. *Rutter*, 177 U. S. 505.

Tested by this rule, the jurisdiction of the Circuit Court depended entirely on diversity of citizenship and not in any degree on grounds making the case one arising under the Constitution, laws or treaties of the United States.

Writ of error dismissed.

Mr. Justice WHITE dissented.